833

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 885 66.

MARY LOUISE KENADAY, EXECUTRIX, PLAINTIFF IN ERROR AND APPELLANT,

vs.

ARABELLA D. SINNOTT ET AL.

IN ERROR TO AND APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED MAY 23, 1899.

(17,419.)

(17,419.)

SUPREME COURT OF THE UNITED STATES.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 7, 1899.

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a Court of Appeals of the District of Columbia, April Term, 1899. No. 4, Special Calendar.

MARY LOUISE KENADAY, Executrix, Appellant,
vs.
ARABELLA D. SINNOTT, WILLIAM A. PILES, IDA PILES Miller, and Belle Hubert. } No. 890.

Appeal from the supreme court of the District of Columbia.

b Supreme Court of the District of Columbia.

In re Estate of ALEXANDER M. KENADAY, Deceased. No. 7744.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Last Will and Testament of Alexander M. Kenaday.*

In the name of God, Amen. I, Alexander McConnell Kenaday, resident of Washington, District of Columbia, being of sound and disposing mind and memory, calling to mind the frailty and uncertainty of human life, and being desirous of settling my worldly affairs and directing how the estates which it has pleased God to bless me shall be disposed of—after my decease—while I have strength and capacity so to do, do make and publish this last will and testament, hereby revoking and making null and void all other last wills and testaments by me heretofore made. And first, I commend my mortal being to Him who gave it, and my body to the earth, to be buried with [as]* little expense by my executor hereinafter named.

Imprimis. My will is that all my just debts and funeral charges shall be paid out of my estate, by my executrix

Item. I give, devise and bequeath to my beloved wife, Mary Louise Kenaday, all my real estate, household furniture, and claims pending in the courts in relation to said real estate, to wit:

House and lot known as No. 507 & 509 on F street, northwest, Washington, D. C. lot No. 2 (east half) of square 482, 30 x 101.10

House and lot known as No. 621 H street, northwest, lot No. 483 sq. No. 483, 20 $\frac{4}{54}$ x 133 to an alley

House and lot known as No. 2006 G street, northwest, lot No. 25 in square No. 103, 20$\frac{3}{4}$ x 120 ft. to an alley.

And I hereby authorize my wife, as executrix, to convey by deeds

[* Word enclosed in brackets erased in copy.]

in fee-simple any or all of said real estate in accordance with the laws of the District of Columbia, under the advice of some competent attorney

Item. Included as claims pending in the courts, are: An account for taxes against the estate of De Vaughn *vs.* De Vaughn, unjustly withheld, in charge of my attorney Woodbury Wheeler, Esq. Also, an account for moneys withheld by the trustees of Edwards *vs.* Maupin. In charge of my attorney, Frank W. Hackett, Esq., amounting to $1078. with interest at six per cent. per annum from March 7, 1888.

2 Also, my business as a claim agent and as publisher of "The Vedette," together with all books, papers, files, office furniture, &c., &c. Also, 200 shares of Sutro Tunnel stock and Comstock bonds; also, notes and evidences of indebtedness to me, of more or less value; also, deposits of currency entered on my bank book of the National Metropolitan bank, amounting to $10,000.00 more or less

Item. I give, devise and bequeath to my beloved sister Arabella D. Sinnott, residing in New Orleans, La., twelve thousand dollars in registered U. S. 4% bonds, on special deposit in the National Metropolitan bank

Item. I give, devise and bequeath to the surviving children of my deceased sister, Martha J. Piles, out of the residue of 4% bonds deposited as aforesaid ($3,500.00) as follows: To Mrs. Belle Hubert, $500.00 To *to* Wm. A. Piles, $500.00 To Ida Piles, $500.00 To Eloise Piles, $500.00 To Edith K. Piles, $750.00 To Henry C. Piles, $250.00

Item. The promissory note for $1100.00 filed with a chattel mortgage in my name in the office of the recorder of deeds, in the District of Columbia, signed by Mrs. Anna Hemenway, shall be cancelled, and my executrix may allow Mrs. Hemenway $500 in settlement of her account.

The bond of the city of Richmond, for $5000.00 bearing 5 per cent. interest, payable January and July—(on special deposit with the 4% bonds of the U. S. in the National Metropolitan bank,) is hereby devised and bequeathed to my wife and executrix.

San Francisco,

The sum of $5000.00 advanced to Wm. C. McGeorge of a California, no account of which has been rendered by him, is hereby devoted to the relatives of my wife, and used according to her discretion.

In testimony whereof, I, the said Alexander M Kenaday have pages to this my last will and testament, contained on four [sheets]* of this paper, and to every page thereof, subscribed my name and affixed my seal to the last sheet thereof, this 3d day of April, A. D. 1894.

ALEXANDER M KENADAY.

The above instrument, consisting of four pages, was now here subscribed by A. M. Kenaday, the testator, in the presence of each of us, and he has acknowledged to each of us that he has subscribed

the same, and [he]* at his request, sign our names hereto as attesting witnesses.

EWELL A. DICK (5th & F Sts.)
(509 F St.) GEORGE JEFFERSON.
(648 D S. W.) WM. H. BADEN.

Sworn and subscribed to before me this 3rd day of April, A. D. 1894.

[SEAL.] NATHAN H. ROBBINS,
Notary Public.

3 In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

DISTRICT OF COLUMBIA, *To wit:*

Know all men by these presents that we, Mary Louise Kenaday, of the District of Columbia, and the Fidelity and Deposit Company of Maryland, incorporated under the laws of the State of Maryland, are held and firmly bound unto the United States of America in the full sum of forty-five thousand dollars, current money of said — States, to be paid to the said United States, their certain attorneys or assigns; to which payment, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, administrators, successors and assigns, in and for the whole, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 26th day of April, in the year of our Lord one thousand eight hundred and ninety-seven.

Whereas the above-bounden Mary Louise Kenaday is about taking out from the supreme court of the District of Columbia letters testamentary on the personal estate of Alexander McConnell Kenaday, late of the District of Columbia, deceased:

The condition of the above obligation is such that if the above-bounden Mary Louise Kenaday shall well and truly perform the office of executrix of Alexander McConnell Kenaday, late of the District of Columbia, deceased, according to law, and shall, in all respects, discharge the duty of her required by law as executrix aforesaid, without any injury or damage to any person interested in the faithful performance of the said office, then the above obligation shall be void; it is otherwise to be in full force and virtue in law.

MARY LOUISE KENADAY. [SEAL.]
FIDELITY AND DEPOSIT COMPANY OF MARYLAND, [SEAL.]
By JAS. S. EDWARDS, *Of Local Board.*

Signed, sealed, and delivered in the presence of—
A. S. HARKNESS.

Attest: J. SPRIGG POOLE, *Agent.*

Approved:
A. B. HAGNER.

[* Word enclosed in brackets erased in copy.]

DISTRICT OF COLUMBIA, *To wit:*

I, Mary Louise Kenaday, do swear that I will well and truly administer the goods, chattels, personal estate, and credits of Alexander McConnell Kenaday, late of the District of Columbia, deceased, to the best of my knowledge, according to law, and will give a just account of my administration when thereto I shall be lawfully called. So help me God.

MARY LOUISE KENADAY.

Sworn and subscribed before me this 26th day of April, A. D. 1897.

Test: J. NOTA McGILL,
Register of Wills.

4 *Notice to Claimants.*

Filed June 10, 1898.

In the Supreme Court of the District of Columbia, Holding Orphans' Court.

In re Estate of ALEXANDER M. KENADAY, Deceased. No. 7744.

On motion of Mary Louise Kenaday, executrix, by her proctor, it is adjudged and ordered this tenth day of June, A. D. 1898, that Friday, the eighth day of July, 1898, be, and it is hereby, approved as the day for a meeting of creditors or persons entitled to distributive shares or legacies or a residue, and 10 o'clock a. m. as the hour for the same, in this court, and that a notice be published once a week for three weeks in "The Washington Law Reporter" in the following or equivalent form before said day:

Estate of Alexander M. Kenaday, deceased. No. 7744, docket 23, Mary Louise Kenaday, executrix of the last will of said deceased, has, with the approval of the supreme court of the District of Columbia, holding a special term for orphans' court business, appointed Friday, July 8, 1898, at 10 o'clock a. m., as the time and said court as the place for making payment and distribution under the court's direction and control, when and where all creditors and persons entitled to distributive shares or legacies or a residue are notified to attend in person, or by agent or attorney duly authorized, with their claims against the estate properly vouched: Provided, this order be published once in each of three successive weeks before said day in the "Washington Law Reporter."

Signed June 10, 1898.

J. NOTA McGILL,
Register of Wills.

WM. HENRY DENNIS,
Proctor for Executrix.

By the court:
A. B. HAGNER,
Asso. Justice.

5 *Petition.*

Filed July 8, 1898.

In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

Estate of ALEXANDER M. KENADAY, Deceased—MARY LOUISE KENADAY, Executrix. No. 7744.

Petition of Arabella D. Sinnott, William A. Piles, Ida Piles Miller, and Belle Hurbert.

Petitioners respectfully show to this honorable court that they are citizens and residents of New Orleans, State of Louisiana, and are the only surviving next of kin and heirs-at-law of Alexander M. Kenaday, deceased, who died in the city of Washington March 25, 1897.

Your petitioner Arabella D. Sinnott is the only surviving sister and your petitioners William A. Piles, Ida Piles Miller, and Belle Hurbert are the only surviving children of his deceased sister, Martha J. Piles.

The said Alexander M. Kenaday, deceased, left no children nor descendants of children.

He left a last will and testament, which was duly admitted to probate and is recorded in the office of the register of wills for this District, and on the 26th of April, 1897, his widow, Mary Louise Kenaday, was duly appointed and qualified as executrix and took charge of said estate.

On the 30th of April, 1897, an inventory of said estate was filed in this honorable court showing the amount which went into the hands of said executrix.

On the — day of June, 1897, the executrix paid over to your petitioner Arabella D. Sinnott the legacy of $12,000 in the United States registered 4% bonds left her by said will.

The executrix also paid over to your petitioners—

William A. Piles	$500.00
Ida Piles Miller	500.00
Belle Hurbert	500.00

in money as their legacies in said will. She also paid to another legatee, Edith K. Piles (since dead), $750.00 in money as her legacy.

The other two legatees, to wit, Henry C. Piles and Eloise Piles, have not been paid the amounts left them, the said Eloise having died before the testator, Alexander M. Kenaday, and the said Henry C. not having been heard from during the last six years and who your petitioners believe is dead.

6 Your petitioners show that there remains undistributed in the hands of said executrix, as set forth in the inventory filed by her on April 30, 1898, U. S. 4 % registered bonds, $12,500, together with the interest collected on same.

Interest checks, U. S. Treasury	$1,715.00
Pension " " "	248.00
Cash on deposit Metropolitan bank	810.00

which were not disposed of by said will and which belong to your petitioners, as they are advised, as next of kin of the said Alexander M. Keneday, deceased, in the following proportions, to wit:

One-half to your petitioner Arabella D. Sinnott and one-half to your petitioners William A. Piles, Ida Piles Miller, and Belle Hurbert in equal shares.

Your petitioners, therefore, pursuant to the order of this court passed herein on June 10, 1898, file this their claim as distributees to said personal estate, and pray that a decree be rendered by this honorable court directing said executrix, after deducting all proper credits, to pay over to your petitioners in the respective proportions due them as distributees thereof, as hereinbefore set forth, the United States 4 % registered bonds and moneys hereinbefore mentioned.

And that petitioners may have such other and further relief as to the court may appear just and proper, the premises considered.

A. D. SINNOTT.
WM. A. PILES.
IDA P. MILLER.
BELLE HUBERT.

F. P. B. SANDS,
W. A. MILLIKEN,
Proctors for Claimants.

STATE OF LOUISIANA, *To wit:*

The petitioners, Arabella D. Sinnott, William A. Piles, Ida Piles Miller, and Belle Hurbert, being duly sworn according to law, depose and say that they have read the above petition by them signed and that they know the contents thereof, and that the facts therein stated as of their own knowledge are true and those facts stated upon information and belief they believe them to be true.

A. D. SINNOTT.
WM. A. PILES.
IDA P. MILLER.
BELLE HUBERT.

Subscribed and sworn to before me this fifth day of July, A. D. 1898.

[SEAL.]

WM. R. KER,
Notary Public.

7 *Account.*

Filed July 15, 1898.

No. 7744. Admn. Doc. 23.

Supreme Court of the District of Columbia, Special Term for Orphans' Court Business.

First Account of Mary Louise Kenaday, Executrix of the Last Will and Testament of Alexander M. Kenaday, Deceased.

(Letters testamentary issued April 26, 1897.)

This accountant charges herself with the inventory by her returned on April 30, 1897 (recorded in Liber of Inventories No. 32, J. N. McG., at folio 353), consisting of the following:

$5,000 bond of city of Richmond, Va., appr. @	$5,000.	
24,500 U. S. 4 % registered bonds (due in 1907), appr. @	27,195.	
200 shares stock Comstock Tunnel Co., appr. @	0.	
1 certificate of scrip of the said Comstock Tunnel Co., appr. @	0.	
Household furniture, &c	418.75	
		$32,613.75

Also with the inventory of money as well as list of debts due the estate filed with the above (recorded in same Liber, folio 358), embracing the following items:

Cash found on deposit in Nat'l Met'n bank, D. C.	$810.60	
Interest checks, U. S. bonds	1,715.	
United States pension checks	248.	
		2,773.60

(The note of Anna Hemenway mentioned in will of testator has never been found by this accountant.)

She also charges herself with the following collections:

1897.		
July 16. Gain on sale of $1,500 U. S. bonds	$7.50	
July 1. Interest on $24,500 U. S. 4 % "	245.	
" " " Richmond bond ($5,000)	125.	
Oct. " " " $11,000 U. S. 4 % bonds	110.	
1898.		
Jan'y 1. " " " " " "	110.	
" " " Richmond bond	125.	
Ap'l " " " $11,000 U. S. 4 % bonds	110.	
July " " " " " "	110.	
" " " Richmond bond	125.	
		1,067.50
Amount forward		$36,454.85
Amount brought forward	$36,454.85	

She asks credit and allowance for the following:

By paid funeral expenses:

Joseph Gawler, undertaker, Vou. 1		$268.50

By paid debts and liabilities of decedent:

Dr. H. H. Barker,	Vou. 2	$107.	
" Jas. T. Sothoron,	" 3	30.	
D. C. tax, 1896-'97,	" 4	291.26	
R. L. Quigley, druggist,	" 5	11.60	
D. C. sp'l assessment,	" 6	9.12	
Wash'n Gaslight Co.,	" 7	8.12	
			457.10

8	By commissions on $36,454.85, at 10 per cent. (out of which executrix has paid for bond $100, also counsel fees)			3,645.48
	By paid costs and expenses:			
	Wash'n Law Reporter,	Vou. 8..	$6.30	
	" " "	" 9..	5.00	
	Wash'n Post,	" 10..	6.10	
	Witnesses to prove will,	" 11..	3.75	
	Wash'n Safe Dep. Co., rent of box,	" ..	2.50	
	Appraisers,	" 13..	6.00	
	Court of Appeals, D. C., costs,	" 14..	28.85	
	Register of wills,	" 15..	28.57	
	" " " (this ac.),	" 16..	29.69	
	Wash'n Law Reporter "final notice,"	" 17..	7.50	
			.....	124.26
				$4,495.34
	Balance for distribution			31,959.51
			$36,454.85	$36,454.85

Balance for distribution brought forward $31,959.51

The executrix, respectfully reserving all her rights to relief and protection in this court and in a court of equity, states that she has made the following actual disposition of said balance:

To Rock Creek cemetery, for burial lot, etc., receipt No. 1...		.....	$317.
" " " " " monument, etc , receipt No. 2.		.....	575.
(The above under her powers as executrix in regard to the interment.)			
To *Arabella D. Sinnott* (her legacy), $12,000 U. S. 4 % bonds appraised @ .....$13,320.			
Interest on same from April 1, 1897, to July 1, 1897 (time of delivery)..	120.		
		.....	13,430.
To Mrs. *Belle Hubert*, legacy (paid July 16, 1897).....		.....	500.
" *William A. Piles*, legacy (paid July 16, 1897).....		.....	500.
" *Ida Piles Miller*, legacy (paid July 16, 1897)...		.....	500.
" *Edith K. Piles*, legacy (paid May 16, 1897) (now deceased)		.....	750.
" *Henry C. Piles*, if living, the amount *reserved* by executrix in case of his appearance to claim his legacy		.....	250.
To *Anna Hemenway*, her legacy.....		.....	500.
			$17,322.
To *Mary Louise Kenaday* (widow), city of Richmond bond, appraised @.....	$5,000.		
Household furniture, " "	418.75		
"Sutro Tunnel stock" (Comstock), appraised @.	0.		
And on account of the bequest to her by the testator of "notes and evidences of indebtedness to me," "deposits of currency entered on my bank book," and other personal estate, the residue, consisting mainly of United States bonds and deposits in bank.	9,218.76		
		.....	14,637.51
		$31,959.51	$31,959.51

MARY LOUISE KENADAY,
Executrix of Estate of A. M. Kenaday, Deceas'd.

9 DISTRICT OF COLUMBIA, *To wit:*

JULY 14TH, 1898.

This day appeared Mary Louise Kenaday, executrix under the will of Alexander M. Kenaday, deceased, as aforesaid, and made oath on the Holy Evangels of Almighty God that the foregoing account as stated is just and true; that she has *bona fide* paid or secured to be paid the several sums for which she claims credit and allowance.

Test: DORSEY CLAGETT,
[SEAL.] *Notary Public for the District of Columbia.*

Exceptions to Account.

Filed July 22, 1898.

In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In the Matter of the Estate of ALEXANDER M. KENADAY, Deceased. No. 7744.

Now come Arabella D. Sinnott, William A. Piles, Ida Piles Miller, and Belle Hurbert, next of kin and only surviving heirs-at-law of Alexander M. Kenaday, dec'd, and, by their proctors, William A. Milliken and Francis P. B. Sands, file these their exceptions to the last account filed by the executrix, Mary Louise Kenaday, herein.

First. These exceptants object to the claim of ten per cent. commission on the gross amount of inventory, for the reasons that the estate, consisting mainly of United States bonds and other bonds, called for no action on the part of the executrix that would in any event warrant a claim or an allowance of more than five per cent. commission thereon; and, further, because the specific bequest of the $5,000 Richmond City bond to the executrix *as such* was clearly intended to be in lieu of all commissions.

Second. These exceptants object to the claim presented by the executrix to commissions on the $5,000 Richmond City bond, and the interest thereon, collected by her, and on the appraised value of the household furniture, to wit, $418.60, for the reason that those two items were bequeathed to her specifically on which no commissions can properly be allowed.

Third. These exceptants object to the credits claimed by said executrix of the items for purchase of burial lot and for the monument, aggregating the sum of $892, as being excessive, illegal, and in violation of the provisions of the will of decedent.

Fourth. These exceptants object to the pretense of claim made in said account by the said executrix as to the entire balance and residue of the estate in her own right, for the reasons that there is no residuary clause in said will making any such disposition of said residue; that one of the legacies failing because of the death of the legatee prior to the death of the testator that legacy went into the residue of the estate not disposed of by the will and because *the* all

the said residue undisposed of by the will belongs to these exceptants as the only next of kin and heirs-at-law of the decedent, Alexander M. Kenaday, and, further, because the United States registered 4 % bonds, forming the main portion of the said residue of the personal estate, amounting to $12,500, were acquired by the decedent after the date of his said will, and were not disposed of by the said will in anywise, and therefore belong to these exceptants as such next of kin and heirs-at-law of said decedent.

Fifth. These exceptants object to the sale of $1,500 of the United States 4 % registered bonds, as recited by the executrix, the said bonds having formed a part of the undisposed-of estate belonging to these exceptants, as next of kin to decedent, and the executrix was without power, in the absence of authority from this court, by its order, to dispose of said bonds.

W. A. MILLIKEN,
F. P. B. SANDS,
Proctors for Exceptants.

10 *Order.*

Filed July 22, 1898.

In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In re Estate of ALEXANDER M. KENADAY, Dec'd. No. 7744.

On motion of F. P. B. Sands and Wm. A. Milliken, proctors for Arabella B. Sinnott *et al.*, next of kin of the decedent, A. M. Kenaday, dec'd, it is, this 22d day of July, 1898, ordered that the Secretary of the Treasury be, and he is hereby, requested to order to be certified to this court a copy from the records of the office of the Register of the Treasury of the amount of registered U. S. 4% bonds standing in the name of Alexander M. Kenaday on the 1st day of April, 1897.

A. B. HAGNER,
Asso. Justice.

Certificate.

Filed August 5, 1898.

UNITED STATES OF AMERICA.

TREASURY DEPARTMENT, *August* 1, 1898.

Pursuant to section 882 of the Revised Statutes I hereby certify that the annexed certificate of the Register of the Treasury is a true statement of the registered bonds therein described as shown by the records in this department.

In witness whereof I have hereunto set my hand and caused the

seal of the Treasury Department to be affixed on the day
[SEAL.] and year first above written.

O. L. SPAULDING,
Acting Secretary of the Treasury.

W. R.
S. M. G.

All official letters to this office must be addressed to the Register of the Treasury.

Initials C. P. F.

TREASURY DEPARTMENT,
OFFICE OF THE REGISTER,
WASHINGTON, D. C., *July 30th*, 1898.

I hereby certify that the records of this office show that the following-described registered bonds of the United States—four per cent. consols of 1907—were standing in the name of Alexander M. Kenaday on the first day of April, 1897, viz:

Date.	Number.	Amount.
April 23rd, 1889	71,519	$500
"	37,400	5,000
"	37,401	5,000
"	37,402	5,000
April 1st, 1895	44,695	5,000
"	183,336	1,000
"	183,337	1,000
"	183,338	1,000
"	183,339	1,000
Total		$24,500

J. W. LYONS,
Register of the Treasury.

11 *Answer to Exceptions.*

Filed August 5, 1898.

In the Supreme Court of the District of Columbia, Holding Orphans' Court.

In re Estate of ALEXANDER M. KENADAY, Deceased. No. 7744.

Answer to exceptions.

In answer to the exceptions filed July 22, 1898, by Arabella D. Sinnott and others, the executrix, Mary Louise Kenaday, says that she is advised that said exceptions have no legal standing before the court until and unless in a court of equity the exceptants ob-

tain a decree that this executrix is trustee for the next of kin for a balance in her hands of which it shall be then established that the testator did not intend the executrix to have the beneficial enjoyment, and she states that no bill in equity has been filed for that purpose.

Respectfully reserving her rights in this respect, she further says:

First. She has asked for ten per cent. commissions for the reasons, among others, that the parties now excepting have for a long time subjected her to annoyance and litigation, as shown in part by the records of this court, and are still keeping up litigation to an extent that cannot be foreseen, thereby causing her an indefinite amount of expense for attorneys and counsel. The bequest of the city of Richmond bond merely designates her as "my wife and executrix," and is not stated to be for services as executrix.

Second. She is advised that the second exception is not well founded in law.

Third. The executrix is authorized by the will to pay all funeral charges, and did so in accordance with the means and condition in life of the testator. She understood that this was in accordance with the wishes of all his family.

Fourth. The executrix has distributed to herself what remains of the personal estate after paying the legacies to other persons, because it comes under the designations of "evidences of indebtedness," "deposits of currency," etc., which are bequeathed to her. She is advised that in any case she would be entitled to retain the same as executrix until the next of kin obtained a decree in equity making her trustee for them upon a construction of the will. She is advised that it is immaterial when the testator bought the bonds he owned at his death.

Fifth. The $1,500 of the United States bonds were sold in order to pay speedily the legacies to the nieces and nephews of testator in a few months after his death, and receipts in full were given for said legacies by the parties, who professed themselves satisfied and one of whom has since died.

WM. H. DENNIS,
Proctor for Executrix.

12 1898, Oct. 7.—Cause argued on exceptions and submitted.

In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

On this 11th day of October, A. D. 1898, the foregoing account being now presented for approval, the same is, after examination by the court, approved and passed.

A. B. HAGNER, *Justice.*

Appeal.

Filed October 13, 1898.

In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In the Matter of the Account of MARY LOUISE KENADY, Executrix of Alexander McConnell Kenaday, Dec., & Exceptions Thereto. No. 7744.

Now come the exceptors, Arabella D. Sinnott, William A. Pyles, Ida Pyles Miller, and Belle Hurbert, and by their solicitor, W. A. Milliken, enter & file this their appeal to the Court of Appeals of the District of Columbia from the order passed herein on the eleventh day of October, 1898, by the justice presiding in special term, in the above-entitled proceedings overruling the exceptions & passing & approving the account filed herein by the executrix.

W. A. MILLIKEN,
Solicitor for Exceptors.

Service of citation waived.
Oct. 12th, 1898.

WM. H. DENNIS,
Proctor for Executrix.

13 *Mandate of Court of Appeals.*

Filed January 20, 1899.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable [SEAL.] the justices of the supreme court of the District of Columbia, Greeting:

Whereas lately, in the supreme court of the District of Columbia, before you or some of you, in a cause entitled *In re* estate of Alexander M. Kenaday, deceased, probate No. 7744, wherein the order of the said supreme court entered in said cause on the 11th day of October, A. D. 1898, is in the following words, viz:

"In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

On this 11th day of October, A. D. 1898, the foregoing account being now presented for approval, the same is, after examination by the court, approved and passed.

A. B. HAGNER, *Justice.*"

as by the inspection of the transcript of the record of the said supreme court, which was brought into the Court of Appeals of the District of Columbia by virtue of an appeal taken by Arabella D. Sinnott, William A. Pyles, Ida Pyles Miller, and Belle Hurbert,

whereon Mary Louise Kenaday, executrix of Alexander M. Kenaday, deceased, was made appellee, agreeably to the act of Congress in such case made and provided, fully and at large appears;

And whereas in the present term of January, in the year of our Lord one thousand eight hundred and ninety-nine, the said cause came on to be heard before the said Court of Appeals on the said transcript of record and was argued by counsel:

14 On consideration whereof it is now here ordered and adjudged by this court that the order of the said supreme court in this cause of October 11th, 1898, approving and passing the account of the executrix, be, and the same is hereby, reversed with costs, and that the said Arabella D. Sinnott *et al.* recover against the said Mary Louise Kenaday, executrix of Alexander M. Kenaday, deceased, thirty-two dollars and twenty cents for their costs herein expended and have execution therefor.

And it is further ordered that this cause be, and the same is hereby, remanded to the said supreme court, that the account be restated in accordance with the principles of the opinion of this court.

JANUARY 3, 1899.

You therefore are hereby commanded that such execution and further proceedings be had in said cause, in conformity with the opinion and judgment of this court, as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the Honorable Richard H. Alvey, Chief Justice of said Court of Appeals, the 20th day of January, in the year of our Lord one thousand eight hundred and ninety-nine.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Costs of Sinnott et al.

Clerk	$6.20
Printing record	26.00
	$32.20

Endorsed: No. 7744, D. 23. Court of Appeals of the District of Columbia. No. 855, January term, 1899. Arabella D. Sinnott *et al.*, appellants, *vs.* Mary Louise Kenaday, executrix of Alexander M. Kenaday, deceased. Mandate. Filed Jan. 20, 1899. J. Nota McGill, register of wills.

15 *Order of Reference to Register of Wills.*

Filed January 20, 1899.

ARABELLA D. SINNOTT ET ALS.
vs.
MARY LOUISE KENADAY, Ex., &c.

This cause came on for further hearing upon the mandate of the Court of Appeals, reversing the action of Justice Hagner on Oct. 11th, 1898, approving & passing the account of the executrix, Mary Louise Kenaday, and directing the said account be restated by this court in accordance with the principles of the opinion of the Court of Appeals rendered herein. It is therefore ordered that the account filed herein by the said Mary Louise Kenaday, executrix of A. M. Kenaday, dec., be referred to the register of wills to restate the account of said executrix, in accordance with the opinion of the Court of Appeals herein, and to report same to this court for further orders.

A. C. BRADLEY, *Justice.*

Endorsed: No. 7744, D. 23. *In re* estate of Alexander M. Kenaday, deceased. Order of reference to the register of wills to restate the account of the executrix in accordance with the opinion of the Court of Appeals. Filed Jan. 20, 1899. J. Nota McGill, register of wills.

16 *Affidavit of Arabella D. Sinnott.*

Filed January 26, 1899.

Supreme Court for the District of Columbia, Holding a Special Term for Orphans' Court Business.

ARABELLA D. SINNOTT ET ALS.
v.
MARY LOUISE KENADAY, Executrix, &c.

In the matter of the settlement of the estate of Alexander McConnell Kenaday, dec.

Arabella D. Sinnott makes oath that she is the only surviving sister of Alexander McConnell Kenaday, dec. His only other sister, Mrs. Martha J. Piles, died Jan., 1887, leaving surviving her *six* childre*d*, to wit, Mrs. Belle Hubert, Mrs. Ida Piles Miller, William A. Piles, Eloise Piles, Edith K. Piles, and Henry C. Piles. Of these, Eloise Piles died Feb'y, 1895; Edith K. died June, 1897, and Henry C. is believed to be dead. He left his home in New Orleans, La., some time prior to the death of his mother, Jan., 1887, and has not been since heard from by affiant nor by his brother William A. nor by any of his sisters. Affiant has made an earnest effort to ascertain information concerning him by extensive correspondence with those

who knew him in different parts of the United States, and by advertisement in the daily papers in New York, Chicago, and San Francisco, but has failed to obtain any information whatever concerning him.

His brother & sisters have also made diligent effort to find him or to obtain information concerning him, but to no avail, and in the settlement of his mother's estate in New Orleans he has been presumed to be dead, and his interest in said estate has been distributed accordingly between his brother & sisters. Owing to his long absence & silence and the inability of affiant or any of his family to obtain any information concerning him, affiant be-
17 lieves he must be dead.

ARABELLA D. SINNOTT.

Sworn to and subscribed before me this 26th day — Jan., 1899.
[SEAL.] GEO. W. LINKINS,
Notary Public.

Endorsed: No. 7744, D. 23. Arabella D. Sinnott *et als. v.* Mary Louise Kenaday, executrix. Affidavit of A. D. Sinnott as to Henry C. Piles' absence. Filed Jan. 26, 1899. J. Nota McGill, register of wills.

Affidavit of Wm. A. Piles et al.

Filed February 10, 1899.

ARABELLA D. SINNOTT, WILLIAM A. PILES, IDA PILES MILLER, and Belle Hubert
vs.
MARY LOUISE KENADAY, Executrix.

Affidavit.

STATE OF LOUISIANA, *City of New Orleans.*

Personally came and appeared before me, the undersigned authority, William A. Piles, Mrs. Ida Piles Miller, and Mrs. Belle Hubert, each of whom, being by me first duly sworn, did depose and say that their mother, Martha J. Piles, who was a sister of Alexander McConnell Kenaday, dec., died in New Orleans, La., in January, 1887, leaving surviving her children, William A. Piles, Ida Piles Miller, Belle Hubert, Edith K. Piles, Eloise Piles, and Henry C. Piles; that the said Henry C. Piles was absent
18 from New Orleans at the time of his mother's said death; that he returned to New Orleans some time during the year 1888, the exact date of which affiants are unable to state; that he remained in New Orleans for about one year, to the best of affiant's knowledge, until some time in the latter part of the year 1889, when he again left said city for parts unknown to affiants, since which time nothing has been heard of him, nor have affiants been able to learn anything concerning him, although diligent inquiry has been

made by them. It is now more than nine years since he left New Orleans, his home, and as they have been wholly unable to find out anything concerning him, they believe him to be dead. Eloise Piles died in 1895; Edith K. Piles died in 1897. Affiants are, therefore, the only surviving children of Martha J. Piles, deceased, and as such are entitled to the one-half interest in the residue of the estate of their uncle, Alexander McConnell Kenaday, dec., and their aunt, Mrs. Arabella D. Sinnott, is entitled to the other half.

WILLIAM A. PILES.
MRS. IDA PILES MILLER.
MRS. BELLE HUBERT.

Sworn to and subscribed before me this sixth day of February, 1899.

[SEAL.] W. B. BARNETT, *Not. Pub.*

Endorsed: No. 7744, D. 23. *In re* estate of Alexander M. Kenaday, deceased. Affidavit as to death of Henry C. Piles, Eloise Piles, and Edith K. Piles. Filed Feb. 10, 1899. J. Nota McGill, register of wills.

19 *Account.*

Filed February 10, 1899.

No. 7744. Adm'n Doc. 23.

Supreme Court of the District of Columbia, Special Term for Orphans' Court Business.

Account of Mary Louise Kenaday, executrix under the will of Alexander M. Kenaday, deceased, stated by the register of wills in pursuance of an order of court passed herein January 20th, 1899.

She should be charged with the balance distributed to her in her individual capacity, as shown by her first account, approved & passed Oct. 11, 1898, from which an appeal was taken to the Court of Appeals of the District of Columbia, and, in accordance with the opinion rendered by said court, was remanded to this court for further proceedings		$9,208.76
She should also be charged with the accrued interest on the U. S. bonds, the same constituting a part of said balance, from the passing of said first account to the 1st January, 1899, namely:		
For October, 1898	$110.00	
" January, 1899	110.00	
		220.00
She should also be charged with the commission of 10 % allowed by said first account on $375.00, the accrued interest on the City of Richmond bond for $5,000, and held by said Court of Appeals to be a specific legacy to the said Mary Louise Kenaday		37.50
She should also be charged with the amount of costs in said Court of Appeals, directed by the mandate of said court to be recovered by Arabella D. Sinnott *et al.* against Mary Louise Kenaday, executrix		32.20
Carried forward		$9,498.46

20	Brought forward		$9,498.46	
	She is entitled to credit for the following:			
	Interest on the $5,000 City of Richmond bond heretofore referred to	$125.00		
		125.00		
		125.00		
			.....	$375.00
	Cash found on deposit at the time of testator's death (legacy).		.....	810.60
	Court costs from May 27, 1898, to January 20, 1899, including copies of records, filing of papers, recording orders and appeal bond, &c.	$21.15		
	And costs for this account, vou. 18	6.07		
			.....	27.22
				$1,212.82
	Balance for distribution		.....	8,2[illegible].64
			$9,498.46	$9,498.46
	Balance down		$8,285.64	
	Which is distributable as follows:			
	To Arabella D. Sinnott, sister, ½		.....	$4,142.82
	" Mrs. Bell- Piles Hubert, niece, ⅛ of ½		.....	828.56
	" Edith K. Piles, " " "		.....	828.56
	" Ida Piles Miller, " " "		.....	828.56
	" Wm. A. Piles, nephew, " " "		.....	828.56
	" Henry C. Piles, " " "		.....	828.56
	Fractions		.....	.02
			$8,285.64	$8,285.64

21 *On this 10th day of February*, A. D. 1899, the foregoing account being now presented for approval, the same is, after examination by the court, approved & passed.

A. C. BRADLEY,
Asso. Justice.

Endorsed: No. 7744, D. 23. *In re* estate of Alexander M. Kenaday, deceased. Account of Mary Louise Kenaday, executrix, stated by the register of wills under order of court dated Jan'y 20, 1899. Approved & passed Feb'y 10, 1899. Recorded, Accounts # 41, J. N. McG., folio 137. Filed Feb. 10, 1899. J. Nota McGill, register of wills.

Objections of Executrix.

Filed February 10, 1899.

In the Supreme Court of the District of Columbia, Holding Orphans' Court.

In re Estate of ALEXANDER M. KENADAY, Deceased. No. 7744.

Mary Louise Kenaday, executrix of the last will of Alexander M. Kenaday, deceased, respectfully reserving all her rights to relief at law or in equity, excepts and objects to the statement of account which she is informed has been prepared by the register of wills for submission to the court, and for grounds of objection shows:

1. That this executrix is thereby charged with an excessive amount as interest on United States bonds. The balance for dis-

tribution to the next of kin (under the decision of the Court of Appeals, unless hereafter modified), according to said state-
22 ment, is nominally $8,285.64, which, however, is shown by the accounts of the estate to consist wholly of United States 4 per cent. bonds, appraised at 111, so that less than $7,500 in par or face value of said bonds is distributable as a residue under said decision.

This executrix ought, therefore, to be charged with only $75 or less for interest on U. S. bonds in October, 1898, and $75 or less for the same in January, 1899, instead of $110, as in said account, and should be credited with $140, the difference between $440, one year's interest on $11,000 of said bonds, charged to her in her first account, and $300, one year's interest on $7,500 of said bonds.

2. That the amount of $32.20, costs in the Court of Appeals, instead of being charged against her, should be credited to her as an expense of her administration, as she has acted throughout in good faith, according to the advice of counsel and the orders of this honorable court, and the appeal taken was necessary in order to obtain a construction of the will written by the testator himself in what is alleged to be obscure and ambiguous language. She also asks credit for a bill of $6 and a bill of $20, paid by her as executrix for printing the briefs on the appeals in this case, for the same reasons.

3. In order to reserve all rights, in case of further appeal, she objects that this honorable court, holding orphans' court, is without jurisdiction to order and direct a distribution to the next of kin of a balance alleged to be in the hands of an executrix and not disposed of by the will, and that its order will not protect her or her surety in making such a distribution, and also that there is no balance in this case undisposed of by the will.

4. She further objects that this branch of the court can distribute such a balance, if at all, only in accordance with the statute of distributions contained in the Maryland act of 1798, ch. 101, sub. ch. 11, which is the only guide and authority of this court in distributing the personalty of an intestate to and among his next of kin,
and according to this chapter the widow of said Alexander M.
23 Kenaday is entitled to one-half of the alleged residue as to which he died intestate before distribution to his collateral relations; and, if said chapter be held not to apply, then she submits that if there be, as has been alleged in these proceedings, a minor child, named Orville Helm Bissell, of Eloise Piles Bissell, a niece of said testator, who died before the said testator, then there is no authority for excluding said minor child from taking his parent's share, as one of the "next of kin," the words excluding representation among such collaterals being contained in said chapter.

WM. H. DENNIS,
Attorney for Executrix.

Endorsed: No. 7744, D. 23. Kenaday, Alexander M., estate of. Objections of executrix to account stated by register of wills. Filed Feb. 10, 1899. J. Nota McGill, register of wills.

24 *Order.*

Filed February 10, 1899.

In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In the Matter of the Estate of ALEXANDER M. KÉNADAY, Dec.

This cause came on for further directions upon the final account of Mary Louise Kenaday, executrix of the estate of Alexander M. Kenaday, dec., as restated in pursuance of the opinion of the Court of Appeals rendered herein on the 3d day of January, 1899, reversing and remanding this cause, and said account is by the court passed and approved.

Thereupon, on motion of Arabella D. Sinnott, by her attorneys, it appearing from said account that there is in the hands of the said executrix, Mary Louise Kenaday, belonging to the said Arabella D. Sinnott, as distributee of the estate of Alexander M. Kenaday, deceased, the sum of ($4,142.82) four thousand one hundred and forty-two dollars and eighty-two cents, which she is now entitled to have paid over to her, it is therefore ordered by the court that Mary Louise Kenaday, executrix of Alexander M. Kenaday, dec., forthwith pay over & deliver to the said Arabella D. Sinnott, through her attorneys of record, the said sum of ($4,142.82) four thousand one hundred and forty-two $\frac{82}{100}$ dollars, being her distributive share in said estate, taking receipt for same.

A. C. BRADLEY, *Justice.*

Endorsed: No. 7744, D. 23. *In re* estate of Alexander M. Kenaday, deceased. Order directing Mary Louise Kenaday, executrix, to pay to Arabella D Sinnott $4,142.82. Filed Feb. 10, 1899. J. Nota McGill, register of wills.

25 *Appeal by Executrix.*

Filed February 10, 1899.

In the Supreme Court of the District of Columbia, Holding Orphans' Court.

In re Estate of ALEXANDER M. KENADAY, Deceased. No. 7744.

Mary Louise Kenaday, executrix of Alexander M. Kenaday, deceased, appeals in open court to the Court of Appeals from the order, dated this 10th day of February, 1899, approving and passing the account headed "Account of Mary Louise Kenaday, executrix under the will of Alexander M. Kenaday, deceased, stated by the register of wills, in pursuance of an order of court passed herein January 20th, 1899," and from an order directing her to distribute forthwith

to Arabella D. Sinnott, in pursuance of said account and order, the amount therein mentioned as her share.

WM. H. DENNIS,
Attorney for Executrix.

Endorsed: No. 7744, D. 23. *Kenaday*, Alexander M., estate of. Appeal by executrix. Filed Feb. 10, 1899. J. Nota McGill, register of wills.

26 *Order Fixing Supersedeas Bond.*

Filed February 10, 1899.

In the Supreme Court of the District of Columbia, Holding Orphans' Court.

In re Estate of ALEXANDER M. KENADAY, Deceased. No. 7744.

Mary Louise Kenaday, executrix of Alexander M. Kenaday, deceased, having appealed in open court to the Court of Appeals from the order dated this day approving and passing the account headed "Account of Mary Louise Kenaday, executrix under the will of Alexander M. Kenaday, deceased, stated by the register of wills, in pursuance of an order of court passed herein January 20th, 1899," and from an order directing her to distribute to Arabella D. Sinnott, in pursuance of said account and order, the amount therein mentioned as her share, it is adjudged and ordered, this tenth day of February, 1899, that the amount of bond to be given on said appeal to act as a supersedeas be, and is hereby, fixed at the sum of eight thousand dollars.

A. C. BRADLEY, *Justice.*

Endorsed: No. 7744, D. 23. Kenaday, Alexander M., estate of. Order reciting appeal by executrix in open court and fixing supersedeas bond. Filed Feb. 10, 1899. J. Nota McGill, register of wills.

27 *Waiver of Citation.*

Filed February 13, 1899.

In the Supreme Court of the District of Columbia, Holding Orphans' Court.

In re Estate of ALEXANDER M. KENADAY, Deceased. No. 7744.

On appeal this tenth day of February, A. D. 1899, taken by Mary Louise Kenaday, executrix, to the Court of Appeals of the District of Columbia, citation is hereby waived.

F. P. B. SANDS,
Attorney for Appellees.

Endorsed: No. 7744, D. 23. Kenaday, A. M., estate of. Waiver of citation on appeal. Filed Feb. 13, 1899. J. Nota McGill, register of wills.

Order.

Filed February 25, 1899.

In the Supreme Court of the District of Columbia, Holding an Orphans' Court.

In re Estate of ALEXANDER M. KENADAY, Deceased. No. 7744.

It is by the court, this 25th day of February, 1899, ordered and decreed that the order passed herein February 10, 1899, fixing the amount of the appeal bond be, and it hereby is, modified so
28 that the bond of $8,000 therein mentioned shall run to Arabella D. Sinnott, to operate as a supersedeas to the order directing the payment to her of $4,142.82, and that the penalty of a bond for costs in the matter of the appeal from the order approving the account filed the same day be fixed at fifty dollars, or in lieu of such bond for costs a deposit of the same amount in cash.

A. C. BRADLEY, *Justice.*

Endorsed: No. 7744, D. 23. *In re* estate of Alexander M. Kenaday, deceased. Order making appeal bond of $8,000 run to Arabella D. Sinnott, to operate as a supersedeas to the order directing the payment to her of $4,142.82, and penalty of bond for costs on appeal from order approving account, $50. Filed Feb. 25, 1899. J. Nota McGill, register of wills.

Receipt of Clerk.

Filed February 28, 1899.

Supreme Court of the District of Columbia, the 28th Day of February, 1899.

In re Estate of ALEX. M. KENADAY. No. 7744, Adm'*i*.

Received of Wm. H. Dennis, Esq., fifty and $\frac{x}{100}$ dollars, deposited in lieu of bond for appeal on behalf of Mary L. Kenaday, appellant.

JOHN R. YOUNG, *Clerk.*

Endorsed: No. 7744, D. 23, adm'n doc. Kenaday, Alexander M., estate of. Receipt of clerk of sup. ct., D. C., for $50 deposit in lieu of bond. Filed Feb. 28, 1899. J. Nota McGill, register of wills.

29 Extract from "Administration docket No. 23, J. N. McG.," one of the records in the office of the register of wills for the District of Columbia, *in re* estate of Alexander M. Kenaday, deceased.

* * * * * * *

" 1899, March 1.—Bond of executrix for appeal, in the penalty of $8,000, having been approved by the court, filed and recorded in

Liber Adm'n Bonds #26, J. N. McG., folio 120½, and transmitted to the supreme court D. C."

* * * * * * *

30 *Notice.*

Filed March 14, 1899.

In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In re Estate of ALEXANDER M. KENADAY, Deceased. No. 7744.

Notice.

On the appeal taken by Mary Louise Kenaday, executrix, February 10, 1899, in the above-entitled cause she desires to be included in the transcript of record, as sufficient for the determination of the questions on appeal, copies of the following papers on file, viz:

Last will of Alexander M. Kenaday.
Bond of executrix.
Notice to claimants, filed June 10, 1898.
Petition of A. B. Sinnott *et al.*, filed July 8, 1898.
Account of executrix, filed July 15, 1898.
Exceptions of A. D. Sinnott *et al.*, filed July 22, 1898.
Order to Secretary of Treasury, filed July 22, 1898.
Certificate from " " " " Aug. 5, "
Answer to exceptions, " " 5, "
Order approving account, " Oct. 11, "
Appeal by exceptors, " " 13, "

(NOTE.—The above, except bond, were in record on appeal by claimants.)

Mandate of Court of Appeals, filed Jan. 20, 1899.
Order of reference to register of wills. filed Jan. 20, 1899.
Affidavit of Arabella D. Sinnott, " " 26, "
" " Wm. A. Piles *et al.*, " Feb. 10, "
Account stated by register of wills, " " " "
Objections by executrix, " " " "
Order approving account (on the a/c), " " "
" directing payment to Mrs. Sinnott, " " "
Appeal by executrix, " " " "
Order fixing supersedeas bond, " " " "
Waiver of citation, " " " "
Order directing form of supersedeas bond, " 25, "
Receipt of clerk for $50, " " " "
Note of filing bond in $8,000, " March 1, "

WM. H. DENNIS,
Attorney for Executrix.

March 14, 1899.

31 Endorsed: No. 7744. #1725. Kenaday, Alexander M., estate of. Notice of papers desired by executrix to be in-

cluded in transcript of record on her appeal. Wm. H. Dennis, attorney for executrix. Filed Mar. 14, 1899. J. Nota McGill, register of wills.

Objections by Arabella D. Sinnott.

Filed March 16, 1899.

In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

Estate of ALEXANDER M. KENADAY, Dec. # 7744.

Objections by Arabella D. Sinnott, appellee, to the papers on file enumerated in the notice of Wm. H. Dennis being copied in the transcript for the Court of Appeals.

I object to any paper being copied into such transcript which was filed prior to Jan. 20th, 1899, the date of the mandate from the court of appeals was filed reversing & remanding the case of Arabella D. Sinnott *et als. v.* Mary Louise Kenaday, executrix. This objection, therefore, covers all the papers enumerated in the notice of Wm. H. Dennis, att'y, &c., from item 1 to & inclusive of item 11.

I insist that the only papers necessary & proper to be copied into this transcript are those included from item 12 to & including item 25 in the said notice of Wm. H. Dennis, att'y.

W. A. MILLIKEN,
Att'y for Arabella D. Sinnott, Appellee.

32 Endorsed: No. 7744. *In re* estate of Alexander M. Kenaday, deceased. Objections by att'y for Arabella D. Sinnott to certain papers being copied into the transcript for the Court of Appeals. Filed Mar. 16, 1899. J. Nota McGill, register of wills.

In the Supreme Court of the District of Columbia, Special Term for Orphans' Court Business.

[10-ct. int. rev. stamp.]

DISTRICT OF COLUMBIA, *To wit:*

I, J. Nota McGill, register of wills for the District of Columbia and *ex officio* clerk of the said special term for orphans' court business, do hereby certify the foregoing to — a true copy of the original will of Alexander M. Kenaday, deceased, filed and recorded in the office of the register of wills for the District of Columbia aforesaid; also that pages numbered 1 to 43, inclusive, constitute a true and perfect transcript of the record in case # 7744, Estate of Alexander M. Kenaday, deceased.

And I further certify that the said will, after having been proven by the witnesses thereto, was, by the order of the supreme court of the District of Columbia, holding a special term for orphans' court business, duly admitted to probate and record on the 23rd day of April, A. D. one thousand eight hundred and ninety-seven.

In testimony whereof I hereunto subscribe my name
[SEAL.] and affix the seal of the said supreme court, special term for orphans' court business, this 25th day of March, A. D. 1899.

J. NOTA McGILL.

33 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, }
District of Columbia. }

I, John R. Young, clerk of the supreme court of the District of Columbia, do hereby certify the foregoing pages, numbered from 1 to 44, inclusive, to be a true and correct transcript of the record and proceedings in said court, as prescribed by rule 5 of the Court of Appeals of the District of Columbia, in cause No. 7744, adm'n doc., *In re* estate of Alexander M. Kenaday, deceased, as the same remains upon the files and records of said court.

In witness whereof I hereunto subscribe my name and
[SEAL.] affix the seal of said court, at the city of Washington, in said District, this 27th day of March, A. D. 1899.

JOHN R. YOUNG, *Clerk.*

34 [Endorsed:] District of Columbia supreme court. No. 890. Mary Louise Kenaday, executrix, appellant, *vs.* Arabella D. Sinnott *et al.* Court of Appeals, District of Columbia. Filed Mar. 27, 1899. Robert Willett, clerk.

35 MARY L. KENADAY, Ex'x, Appellant, }
vs. } No. 888 & No. 890.
ARABELLA D. SINNOTT & Others. }

We have examined the transcripts of the record of proceedings in the special term for orphans' court business, filed by the respective parties, and finding that said court below has, in the restatement of the account of the estate of Alexander M. Kenaday, deceased, followed and observed the opinion and mandate of this court on a former appeal by said Arabella D. Sinnott—

It is therefore ordered that the motion made by the said Arabella D. Sinnott to dismiss or affirm the order of the court below, approving and passing said final account of said estate, under rule 16 of this court, be and the same is denied; but that the said final order of said court approving and passing said account, the same bearing date the 10th day of February, 1899, on the appeal of said Mary L. Kenaday, ex'x., be, and the same is hereby, affirmed, the said account appearing to be stated in accordance with the mandate of this court issued on the former appeal.

(Endorsed:) No. 888. Mary Louise Kenaday, executrix, &c., appellant, *vs.* Arabella D. Sinnott. And No. 890. Mary Louise Kenaday, executrix, &c., appellant, *vs.* Arabella D. Sinnott *et al.* Opinion *per curiam.* Court of Appeals, District of Columbia. Filed April 5, 1899. Robert Willett, clerk.

36 WEDNESDAY, *April 5th, A. D.* 1899.

MARY LOUISE KENADAY, Executrix, Appellant,
vs.
ARABELLA D. SINNOTT, WILLIAM A. Piles, Ida Piles Miller, and Belle Hubert. } No. 890. April Term, 1899.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of record from the supreme court of the District of Columbia and was argued by counsel. On consideration whereof it is now here ordered and adjudged by this court that the order of the said supreme court in this cause of February 10, 1899, approving and passing account be, and the same is hereby, affirmed with costs.

Per MR. CHIEF JUSTICE ALVEY.

April 5, 1899.

37 TUESDAY, *April 11th, A. D.* 1899.

MARY LOUISE KENADAY, Executrix, Appellant,
vs.
ARABELLA D. SINNOTT, WILLIAM A. PILES, IDA PILES Miller, and Belle Hubert. } No. 890.

On motion of Mr. Wm. H. Dennis, attorney for the appellant in the above-entitled cause, it is ordered by the court that a writ of error to remove said cause to the Supreme Court of the United States be, and the same is hereby, allowed on giving bond to act as a supersedeas in the sum of ten thousand dollars.

38 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals, before you or some of you, between Mary Louise Kenaday, executrix, appellant, and Arabella D. Sinnott, William A. Piles, Ida Piles Miller, and Belle Hubert, appellees, a manifest error hath happened, to the great damage of the said appellant, as by her complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right

and according to the laws and customs of the United States should be done.

Seal Court of Appeals, District of Columbia.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 11th day of April, in the year of our Lord one thousand eight hundred and ninety-nine.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

39 FRIDAY, *April 14th, A. D.* 1899.

MARY LOUISE KENADAY, Executrix, Appellant,
vs.
ARABELLA D. SINNOTT, WILLIAM A. PILES, IDA PILES Miller, and Belle Hubert. } No. 890.

Mr. Wm. H. Dennis, of counsel for the appellant in the above-entitled cause, presented to the court for approval supersedeas bond on writ of error to Supreme Court of the United States in the sum of ten thousand dollars.

In the Court of Appeals of the District of Columbia.

MARY L. KENADAY, Executrix, Appellant,
vs.
ARABELLA D. SINNOTT ET AL. } No. 890.

Assignment of Errors.

Mary L. Kenaday, executrix of the last will of Alexander M. Kenaday, deceased, desiring to take this cause by writ of error into the Supreme Court of the United States, respectfully assigns the following as errors in the final judgment of the Court of Appeals—that is to say, the court erred:

1. In refusing to decide that the justice of the supreme court of the District of Columbia, holding the special term of that court for orphans' court business, has no jurisdiction to order and compel distribution by an executrix, to the relations of a testator, of a sum in the hands of such an executrix alleged to be not bequeathed by the will, and in overruling the contention of executrix that such a question is exclusively within the jurisdiction of equity or chancery.

40 2. In deciding that the justice holding said special term had jurisdiction to construe the will of said testator for the purpose of arriving at the conclusion mentioned.

3. In holding that the judicial construction of the will of said testator should be that he failed to bequeath the beneficial interest of part of his personal estate, to wit, sundry United States bonds, instead of holding that they all passed to his widow.

4. In holding that the widow was not entitled to at least one-half of any residue of personal estate not bequeathed by testator.

5. In ignoring and thereby overruling the objections of the executrix to the account stated by the register of wills and dated February 10, 1899.

6. In affirming the order of the court below bearing date February 10, 1899, approving and passing the account termed the final account of this estate.

WM. H. DENNIS,
Attorney for Executrix.

(Endorsed:) Court of Appeals D. C. Kenaday, executrix, appellant, *v.* Sinnott & others. No. 890. Assignment of errors. Court of Appeals, District of Columbia. Filed Apr. 14, 1899. Robert Willett, clerk.

41 In the Court of Appeals of the District of Columbia.

MARY L. KENADAY, Executrix, Appellant,
vs.
ARABELLA D. SINNOTT, WILLIAM A. PYLES, IDA PYLES Miller, and Belle Hubert. } No. 890.

Mary L. Kenaday, executrix of the last will of Alexander M. Kenaday, deceased, not being absolutely advised whether her proceeding to obtain a review in the Supreme Court of the United States should be designated as a writ of error or an appeal, appeals to said Supreme Court of the United States from the order of the Court of Appeals herein bearing date of the 5th day of April, 1899, and prays that the record, supersedeas bond, and other proceedings on her writ of error be taken as the record, supersedeas bond, and proceedings on this appeal, if the latter be decided to be technically the proper method in the premises.

WM. H. DENNIS,
Attorney for Executrix.

(Endorsed:) No. 890. Kenaday's Executrix *v.* Sinnott and others. Appeal of executrix to the Supreme Court of the United States. Court of Appeals, District of Columbia. Filed Apr. 17, 1899. Robert Willett, clerk.

42 In the Court of Appeals of the District of Columbia.

MARY L. KENADAY, Executrix, Appellant,
vs.
ARABELLA D. SINNOTT, WILLIAM A. PYLES, IDA PYLES Miller, and Belle Hubert. } No. 890.

On motion of Mary L. Kenaday, executrix, by her attorney, and it appearing to the court that *that* the practice in cases exactly of the character of the present one has not been established by precedent, it is adjudged and ordered by the court this 17th day of April, 1899, that said executrix be, and she is hereby, allowed an appeal from the order of this court passed herein April 5, 1899, and that

the same bond in the sum of ten thousand dollars, to act as a supersedeas upon the issuing of a writ of error in this case, shall stand and act as a supersedeas upon said appeal, or according as said writ of error or appeal is ultimately decided to be the method of obtaining a review of the decision of this court in said cause.

R. H. ALVEY, *Ch. Justice.*

(Endorsed:) Court of Appeals D. C., April term, 1899. No. 890. Mary L. Kenaday, executrix, appellant, *vs.* Arabella D. Sinnott *et al.* Order allowing appeal to Supreme Court U. S. Court of Appeals, District of Columbia. Filed Apr. 18, 1899. Robert Willett, clerk.

43 TUESDAY, *May 2d, A. D.* 1899.

MARY LOUISE KENADAY, Executrix, Appellant, *vs.* ARABELLA D. SINNOTT, WILLIAM A. PILES, IDA Piles Miller, and Belle Hubert.	No. 890, April Term, 1899.

The supersedeas bond on writ of error in the above-entitled cause is hereby approved as of April 14, 1899.

Per MR. CHIEF JUSTICE ALVEY.

May 2, 1899.

44 Know all men by these presents that we, Mary Louise Kenaday, executrix of the last will of Alexander M. Kenaday, deceased, as principal, and Fidelity and Deposit Company of Maryland, a corporation of Maryland, as surety, are held and firmly bound unto Arabella D. Sinnott, William A. Piles, Ida Piles Miller, and Belle Hubert in the full and just sum of ten thousand dollars, to be paid to the said Arabella D. Sinnott, William A. Piles, Ida Piles Miller, and Belle Hubert, their and each of their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this fourteenth day of April, in the year of our Lord one thousand eight hundred and ninety-nine.

Whereas lately, at a Court of Appeals of the District of Columbia, in a suit depending in said court between said Mary Louise Kenaday, executrix, as aforesaid, appellant, and said Arabella D. Sinnott, William A. Piles, Ida Piles Miller, and Belle Hubert, a judgment was rendered against the said Mary Louise Kenaday, executrix, as aforesaid, and the said Mary Louise Kenaday, executrix, as aforesaid, having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Arabella D. Sinnott, William A. Piles, Ida Piles Miller, and Belle Hubert, citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington, within 30 days from the date thereof:

Now, the condition of the above obligation is such that if the said Mary Louise Kenaday, executrix, as aforesaid, shall prosecute said writ of error to effect and answer all damages and costs if she fail to make her plea good, then the above obligation to be void; else to remain in full force and virtue.

MARY LOUISE KENADAY. [SEAL.]
FIDELITY AND DEPOSIT COMPANY OF MARYLAND, [SEAL.]
By J. SPRIGG POOLE, *Attorney-in-fact.* [SEAL.]

[Seal of Fidelity and Deposit Company of Maryland.]

Sealed and delivered in the presence of—
DORSEY CLAGETT.

Approved by—
R. H. ALVEY,
Chief Justice Ct. App'ls.

[Endorsed:] No. 890. Mary Louise Kenaday, executrix, appellant, *vs.* Arabella D. Sinnott *et al.* Supersedeas bond on writ of error to S. C. U. S. Court of Appeals, District of Columbia. Filed April 14, 1899. Robert Willett, clerk.

45 UNITED STATES OF AMERICA, *ss:*

To Arabella D. Sinnott, William A. Piles, Ida Piles Miller, and Belle Hubert, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein Mary Louise Kenaday, executrix, is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Richard H. Alvey, Chief Justice of the Court of Appeals of the District of Columbia, this 2d day of May, in the year of our Lord one thousand eight hundred and ninety-nine.

R. H. ALVEY,
Chief Justice of the Court of Appeals of the District of Columbia.

On this ninth day of May, in the year of our Lord one thousand eight hundred and ninety-nine, personally appeared William H. Dennis before me, the subscriber, and makes oath that he delivered a true copy of the within citation to Francis P. B. Sands, attorney for Arabella D. Sinnott, William A. Piles, Ida Piles Miller, and Belle Hubert, in person, this ninth day of May, A. D. 1899.

WILLIAM H. DENNIS.

Sworn to and subscribed the ninth day of May, A. D. 1899.

ROBERT WILLETT,
Clerk Court of Appeals, Dist. of Col.,
By H. W. HODGES,
Ass't Clerk.

[Endorsed:] Court of Appeals, District of Columbia. Filed May 9, 1899. Robert Willett, clerk.

46 UNITED STATES OF AMERICA, *ss:*

To Arabella D. Sinnott, William A. Piles, Ida Piles Miller, and Belle Hubert, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein Mary Louise Kenaday, executrix, is appellant and you are appellees, to show cause, if any there be, why the decree rendered against the appellant should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Richard H. Alvey, Chief Justice of the Court of Appeals of the District of Columbia, this 2d day of May, in the year of our Lord one thousand eight hundred and ninety-nine.

R. H. ALVEY,
Chief Justice of the Court of Appeals of the District of Columbia.

On this ninth day of May, in the year of our Lord one thousand eight hundred and ninety-nine, personally appeared William H. Dennis before me, the subscriber, and makes oath that he delivered a true copy of the within citation to Francis P. B. Sands, solicitor and attorney for Arabella D. Sinnot, William A. Piles, Ida Piles Miller, and Belle Hubert, in person, this ninth day of May, A. D. 1899.

WILLIAM H. DENNIS.

Sworn to and subscribed the ninth day of May, A. D. 1899.

ROBERT WILLETT,
Clerk Court of Appeals, Dist. of Col.,
By H. W. HODGES,
Ass't Clerk.

[Endorsed:] Court of Appeals, District of Columbia. Filed May 9, 1899. Robert Willett, clerk.

47 Court of Appeals of the District of Columbia.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 46, inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Mary Louise Kenaday, executrix, appellant, *vs.* Arabella D. Sinnott, William A. Piles, Ida Piles Miller, and Belle Hubert, No. 890, April term, 1899, as the same remains upon the files and records of said Court of Appeals.

Seal Court of Appeals, District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 18th day of May, A. D. 1899.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No., 17,419. District of Columbia Court of Appeals. Term No., 305. Mary Louise Kenaday, executrix, plaintiff in error and appellant, *vs.* Arabella D. Sinnott *et al.* Filed May 23d, 1899.

No. 305

JAN 8 1900

JAMES H. MCKENNEY,
Clerk.

Supreme Court of the United States.

Filed Jan. 8, 1900

OCTOBER TERM, 1899.

MARY LOUISE KENADAY, Executrix,
Plaintiff in Error and Appellant,

vs.

ARABELLA D. SINNOTT et al.

No. 305.

In Error to and Appeal from the Court of Appeals of the District of Columbia.

BRIEF FOR PLAINTIFF IN ERROR AND APPELLANT, AGAINST MOTION TO DISMISS OR AFFIRM.

WM. HENRY DENNIS,
Attorney for Plaintiff in Error and Appellant.

Supreme Court of the United States.

OCTOBER TERM, 1899.

MARY LOUISE KENADAY, Executrix,
Plaintiff in Error and Appellant,
vs.
ARABELLA D. SINNOTT, et al.
No. 305.

In Error to and Appeal from the Court of Appeals of the District of Columbia.

BRIEF FOR PLAINTIFF IN ERROR AND APPELLANT AGAINST MOTION TO DISMISS OR AFFIRM.

This case results from the keen anxiety of some collateral relations to deprive a widow of part of the provision for her benefit, and to gain something which the testator never intended them to have.

Mr. Justice Hagner, a learned jurist of long experience in the testamentary law both of Maryland and the District of Columbia, who heard the case in the first instance, overruled all the exceptions to the final account of Mrs. Kenaday, the widow and executrix.

The Court of Appeals of the District of Columbia, on appeal by said collateral relations, likewise overruled their exceptions, with a severe censure of the spirit displayed in them, saving one exception, namely, that in regard to the

distribution of an alleged residue of the estate, consisting of United States bonds.

This difference of opinion on one point, between two learned Courts, in itself disposes of the charge that the executrix brings this case for review before the Court of last resort only for the purpose of "delay." As executrix, she is bound to sustain the manifest intention of the testator, so far as she can legally do so. As widow, she is meritoriously entitled to a consideration of her rights from the highest tribunal having jurisdiction.

Sykes v. *Chadwick*, *18 Wall.*, *141.*

The questions involved are of a substantial nature, and of general interest. They may be reduced to these points on behalf of the executrix:

1. That the Orphans' Court has *no jurisdiction* over an alleged residue of personalty in the hands of an executrix undisposed of by the will, that jurisdiction being peculiar to equity, as a matter of trust, in the absence of any statute to the contrary.

2. That the Court of Appeals erred greatly against the canons for the construction of wills, by holding a generic bequest to be specific, and by construing against instead of favorably to a widow who renounced her legal share, and so as to produce partial intestacy in a case at least doubtful.

Hardenberg v. *Ray*, *151 U. S.*, *112.*

I.

THE WRIT OF ERROR AND APPEAL.

As to the method of bringing the case to this Court, in the form both of a writ of error and an appeal, it was prompted, out of an abundance of caution, by the diligence and ingenuity shown by the parties on the other side and their counsel in seeking to escape from a hearing of the case here upon its merits.

The reasoning of the learned counsel, however, appears to proceed in a circle, that is to say, they argue that the appeal is void, because the case came here upon the writ of error, and the writ of error is void because the case ought to be brought here upon appeal!

If it be necessary to answer this mode of argument, it may be said that the writ of error was applied for and granted under the authority of *Campbell* v. *Porter*, 162 U. S., 478-489. That was a case upon the validity of a testamentary paper; but the Maryland Act of 1798, ch. 101, which is the law of the Orphans' Court in the District of Columbia, provides that *all* controversies in that Court shall be subject to a trial by jury upon an issue or issues, whenever either of the parties shall require it.

The Maryland Act of 1798, ch. 101, sub-ch. 15, provides as follows:

"16. Whenever either of the parties having a contest in the Orphans' Court shall require, the said court may direct a plenary proceeding, by bill or petition, to which there shall be an answer on oath (or affirmation) and if the party refuse to answer on oath (or affirmation, as the case may require) to any matter alleged in the bill or petition, and proper for the Court to decide upon, the said party may be attached, fined and committed, or his property may be attached and sequestered as aforesaid.

17. And on such plenary proceeding all the depositions shall be taken in writing, and recorded; and in case either party shall require, the Court shall direct an issue or issues to be made up and sent to any court of law which may be most convenient, under all circumstances, for trying the same. * * * *"

By the recent Act of Congress, approved June 8, 1898, all such issues shall be tried by a jury impaneled *in the Orphans' Court itself.*

It is difficult to see how a statutory court, such as the "Special Term for Orphans' Court business," could be regarded, in any sense, as a court of chancery or equity, from which it is carefully contradistinguished by the statute creating it. The fact that the questions in this case arose upon an account of the executrix does not appear to make this a suit in equity, any more than an action of "account" in a court of common law converts that court into a court of chancery. Nor is the Orphans' Court one of general jurisdiction, sitting at one time as a court of law and at another as court of chancery. But, in order to guard against any defeat of justice upon a mere technicality, and not finding an exactly similar case as authority, the Court of Appeals, D. C., very considerately allowed an appeal as an alternative to the writ of error. This was certainly in aid of substantial justice, and involved no hardship or deprivation of rights to any of the parties, but rather the contrary.

It does not appear ingenuous, in the brief in support of the pending motion (p. 8), to argue that the Court of Appeals considered an appeal to be the proper method in this case, because it came to that Court by appeal. As is very well known, *all* cases, including judgments at law, must be taken to the Court of Appeals, by appeal, under the statute creating that Court.

II.

THE QUESTION OF THE FORMER APPEAL.

As to the arguments in support of the motion, to the effect that this case should have been brought to this Court immediately after the decision on the former appeal therein (14 App. Cas., D. C., 1) it seems sufficient to say that this Court would have dismissed it in the same manner and for the same reasons as the case of *Gilbert* v. *Beneficial Endowment Association*, at October Term, 1898, which was a case remanded by the Court of Appeals, D. C., for the

stating of a further account by the auditing officer of the Court below.

This, by the way, was the first and only appeal by the *executrix*. Two former appeals were taken by the next of kin.

It is submitted that it is obvious from the record that very important discretionary duties were left to the Orphans' Court by the mandate of the Court of Appeals (Record, p. 14.) In directing a distribution of an alleged residue to the "next of kin," the Court of Appeals did not undertake to decide who were the next of kin, or in what proportions they should take, or other essential questions, such as that in reference to the alleged death of one of them (Record, pp. 15 and 16.) The account was entirely recast under the mandate (pp. 7–17).

The authorities cited in support of the motion, to the effect that a second appeal will not lie when the action of the lower court is in accordance with the mandate on the first appeal, apply in cases where the court, whose mandate is thus obeyed, is the court of *last resort* in that case. In this case, the Court of Appeals is an intermediate court; and the Supreme Court of the United States, of course, will only entertain cases where the action of the Court below is final, and leaves only ministerial and not judicial action to be taken by the Court or Courts below.

Lodge v. *Twell*, *135 U. S.*, *232*.
McGurkey v. *Toledo, etc., Ry. Co.*, *146 U. S.*, *536*.

While it is true that the original decision of the Orphans' Court, if affirmed in all respects, would have been final as to the next of kin, it does not follow that its reversal was a "final" decision. A judgment at law in favor of the defendant is final against the plaintiff; but if it is reversed in the Court above that is not a "final" and appealable decision. It only gives the plaintiff the right to a new trial,

after which there may be a further appeal, according to circumstances.

Complaint is made (p. 5) that the opinion of the Court of Appeals on the former appeal is not included in the transcript of record in this case. The answer is that it was part of *another case* in the Court of Appeals, and therefore could not be included or certified in this case. Even if this were not so, the defendants in error or appellees had their remedy by certiorari, to require it to be sent up. The executrix always intended to print it as an appendix to the brief in her behalf, for the convenience of this Court, and it is now printed as an appendix to this brief.

It is respectfully submitted that, so far from its being shown that this case should be summarily dismissed or affirmed, it appears that it is deserving of full argument and consideration when it is reached in its regular order.

WM. HENRY DENNIS,

Attorney for Plaintiff in Error and Appellant.

Court of Appeals of the District of Columbia.

ARABELLA D. SINNOTT ET AL., APPELLANTS,

v.

MARY LOUISE KENADAY, EXECUTRIX.

WILLS; UNDISPOSED OF RESIDUE; DISTRIBUTION; ORPHANS' COURT; EXECUTOR'S COMMISSIONS; ALLOWANCES FOR BURIAL EXPENSES.

1. Where a testator bequeaths to his wife, who is named as executrix, a particular class of claims, and also his business as a claim agent, and as publisher of a periodical, with all books, papers, files, etc.; also 200 shares of certain stocks, also notes and other evidences of indebtedness "of more or less value," and deposits of currency entered on his bank book at a certain bank, the bequests are specific, and will not include U. S. registered bonds acquired after the date of the will, or lapsed legacies, or other personal estate of which the testator died possessed.
2. In such case, where the will has no residuary clause, the undisposed of residue devolves upon the executrix, who however takes no beneficial interest therein, but the same is distributable to the next of kin of the testator.
3. Under the Act of Maryland of 1798, Ch. 101, the Supreme Court of the District, holding a special term for Orphans' Court business, has power and jurisdiction to make and enforce distribution of such undisposed of residue of the personal estate of the testator.
4. That the will makes a specific bequest of certain bonds to "my wife and executrix," will not deprive her of commissions where there is nothing to indicate that it was given by way of compensation as executrix and in lieu of commission.
5. An allowance by the Orphans' Court of commissions to an executrix, within the limits prescribed by the Act of Maryland of 1798, is conclusive, and not subject to review in an appellate court.
6. An allowance to an executrix of credit in her account for expenses incurred in the purchase of a lot in a cemetery and the erection of a monument thereon, is proper, when there has been no extravagance n such expenditure, and the rights of creditors and even of legatees are not prejudiced.
7. Legatees who have assented to a sale by the executrix of certain bonds bequeathed to them and who have received the proceeds of sale and receipted therefor, can not thereafter object to the sale.

No. 855. Decided January 3, 1899.

APPEAL from order of Supreme Court of the District of Columbia holding a special term for Orphans' Court business (Probate No 7744), approving and passing a final account settled by an executrix. *Reversed.*

Mr. F. P. B. Sands and *Mr. W. A. Milliken* for the appellants.

Mr. Wm. H. Dennis for the appellee.

Mr. Chief Justice ALVEY delivered the opinion of the Court:

This appeal is taken by the sister, and the children of a deceased sister, as the next of kin of the late Alexander M. Kenaday, deceased, from an order of the court below, approving and passing what would appear to be a final account settled by the executrix of the deceased. And the questions presented on the appeal, as stated in the assignment of errors, have relation to the construction of the last will and testament of the deceased; the power and jurisdiction of the special term of the Supreme Court of this District, sitting to transact Orphans' Court business, to make and enforce distribution of the residue or surplus of the personal estate of the deceased, not specifically or expressly disposed of by his will; and also as to the right of the executrix to be allowed certain sums claimed as credits in her account, against the exceptions of the appellants

The deceased, Alexander M. Kenaday, died in this city of Washington, on March 25, 1897, leaving a last will and testament bearing date the 3d of April, 1894, and by which his widow, Mary Louise Kenaday, was made sole executrix, and which will was duly proved and admitted to probate, and letters testamentary were granted to the executrix named. The deceased left no child or descendant; but he left one sister surviving, and several children of a deceased sister, who predeceased the testator. The surviving sister and some of the children of the deceased sister are the appellants in this appeal, and the widow, the sole executrix, is the appellee.

The case has been in this court on a former appeal (Sinnott vs. Kenaday, 12 App. D. C. 115: 26 Wash. Law Rep. 121); but the specific questions now presented were not then decided by this court. We did, however, say, that the court below would have the power and jurisdiction to grant relief of the nature then prayed, upon a petition filed at the proper time. The petition in that case had been prematurely filed. There had been, at that time, no final or other account, in the nature of a full account, stated by the executrix and approved by the court, showing the true condition of the estate. The final, or what is substantially a full account, has now been stated, and distribution thereon made. The appellants excepted to the account and distribution, but the exceptions were overruled, and the account and distribution were ap-

proved and passed by order of the court of Oct. 11, 1898. It is from that order that this appeal is taken.

By the will of the testator, all his real estate, of considerable quantity and value was devised to his wife, and also a considerable portion of his personal estate. He specifies by general designation a particular class of claims bequeathed to his wife; and he then bequeaths to her his business as a claim agent, and as publisher of "The Vedette," together with all books, papers, files, furniture, etc., etc., also 200 shares of the Sutro Tunnel stock and Comstock bonds; also notes and evidences of indebtedness to him, "of more or less value;" also deposits of currency entered on his bank book of the National Metropolitan Bank amounting to $10,000, more or less.

He then gives to his sister, Mrs. Sinnott, of New Orleans (the sister who survives him), $12,000 in registered U. S. 4 per cent bonds, on special deposit in the National Metropolitan Bank.

Then follow gifts to the children of Mrs. Piles, his deceased sister, "out of the *residue* of 4 per cent. bonds deposited as aforesaid $3,500 as follows:"—naming the legatees, and the amounts given to each, though the several amounts added only make $3,000, and not $3,500—thus leaving of the residue of $3,500 U. S. Bonds on deposit in bank, $500 undisposed of. It is alleged by the appellants that of these amounts thus given to the children of Mrs. Piles, the legacy of $500 given to Eloise Piles, and the legacy of $250 given to Henry C. Piles, have both lapsed by the death of the legatees in the lifetime of the testator.

By another clause of the will there is a promissory note for $1,100.00, secured by a chattel mortgage, made by Mrs. Hemenway, which he directed to be canceled, and that his executrix might allow Mrs. Hemenway $500 in settlement of her account. And then in what appears to be a separate clause of the will he declares that "the bond of the city of Richmond for $5,000 bearing 5 per cent. interest, payable January and July (on special deposit with the 4 per cent. bonds of the United States in the National Metropolitan Bank) is hereby devised and bequeathed to my wife and executrix."

There are some other special provisions in the will, but nothing in addition to what we have recited that is at all material to the questions raised on this appeal. *There is no residuary clause in the will.*

It appears by a certificate from the United States Treasury Department, that about a year after the date of the will, that is, on the 1st of April, 1895, the testator acquired and left

standing in his name and to his credit, in the Treasury of the United States, additional $9,000 United States registered 4 per cent. bonds, and thus making the sum total of United States bonds held to his credit at the time of his death amount to $24,500. And in the absence of a residuary clause or bequest in the will, the principal question here is, to whom should these after-acquired bonds, and the $500 of the residue of the $15,500 bonds on special deposit in the bank, and the two lapsed legacies, or such residue thereof after payment of debts, and all other legitimate claims and charges to which they are subject, be distributed?

The will is certainly very unskillfully drawn, but we think there is no great difficulty, by the application of the ordinary principles of construction, in getting at the intention of the testator, and the legal effect of the instrument.

In this final, or what appears to be the full account stated by the the executrix, she charged herself with the amount of the inventory, and with the increased value or increment of the bonds belonging to the estate, the total amount of the inventory being the sum of $36,454 85. Upon this amount she asked and was allowed a commission of ten per cent., making the sum of $3,645.48. This allowance of commission is excepted to by the appellants as being improper, or as excessive, under the facts of the case.

The executrix claimed and was allowed credit for $268.50 paid to the undertaker as funeral expenses; and she also claimed and was allowed as credits in her account the sum of $317 paid for a burial lot in Rock Creek Cemetery, and the sum of $575 paid for a monument placed over the grave of the deceased. These two latter sums are excepted to by the appellants as not being legally chargeable to the estate.

In making the distribution of the surplus or residue of the personal estate, after deductions of all claims and allowances and for debts paid, and for all legacies paid over or retained, the executrix took credit in her account, and in discharge of the inventory, for the household furniture, and the City of Richmond bond for $5,000; and she then makes distribution to herself of the balance, or remaining surplus of the estate, in this form: "on account of the bequest to her by the testator of 'notes and evidences of indebtedness to me;' 'deposits of currency entered on my bank book,' and other personal estate, the residue consisting mainly of United States bonds and deposits in bank, $9,218.76." This distribution is excepted to by the appellants, as being without right or warrant in law.

There is also an objection made by the appellants to a sale

made by the executrix of $1,500 of the United States bonds, the proceeds of which sale, it appears, were paid over to the Piles legatees, and for which they gave their receipts to the executrix.

1. We shall first examine the question as to what right and nature of interest was taken by the widow and executrix of the testator, under the will; as upon the determination of that question the other questions raised by the exceptions to the account may, to a certain extent, depend.

There can be no question but that the bequest of the particular claims mentioned and described by the testator as then depending in the courts, were specific legacies, and would have been adeemed if they had been collected in the lifetime of the testator. And so the bequests in the succeeding clause of the will whereby the testator gave to his wife "200 shares of Sutro stock and Comstock bonds; also notes and evidences of indebtedness to me, of more or less value; also deposits of currency entered in my bank book of the National Metropolitan Bank, amounting to $10,000, more or less," are of the same character as the claims bequeathed. It is very clear that this bequest did not embrace United States registered bonds. In all these bequests specific things or matters are referred to as the objects of the bequests; and if they had been disposed of or extinguished by the testator in his lifetime, the legacies would have ceased to exist as such. It has been held in repeated decisions, that a bequest of 100/ consols now standing in my name at the Bank of England (Roper on Leg., ch. 3), or of 100/ consols, *part* of my stock; (Kirby v. Potter, 4 Ves. 750; Hays v. Hays, 1 Keen, 97; Shuttleworth v. Greaves, 4 M. & Cr. 35; are specific bequests. And while a legacy is general when it is so given as not to amount to a bequest of a particular thing yet a legacy is specific when it is a bequest of a specific part of the testator's personal estate, which is and can be distinguished from the rest of his personal estate. Therefore, a bequest of money to be received under a judgment or decree of court, is a specific bequest, and, consequently, not liable to abate with general legacies; and as a result of this principle, if the fund out of which such bequest is payable fails, or should for any cause prove to be insufficient to fulfil the bequest, the legatee must suffer the loss. Chase v. Lockerman, 11 Gill and Johnson, 186. If, therefore, a thing or subject matter be bequeathed in a will by such description as to distinguish it from all other things disposed of by the will, so that it does not remain at the death of the testator as property embraced in any other bequest made by the will, it is a specific legacy,

as distinguished from a general legacy ; and the legatee is entitled to the very thing bequeathed if it be possible for the executor to deliver it to him, with all interest or devidends received ; but if it can not be delivered, he can have no claim for compensation in money in lieu of the specific thing bequeathed by the will. But, as a distinguishing quality of a specific legacy, and one that gives it preference over other legacies, it must be paid or retained by the executor, while general legacies may be applied to the payment of debts of the estate of the deceased. Specific legacies must be paid or retained by the executor in preference to those which are general, and must not be sold or otherwise applied for the payment of debts or other charges against the estate until the general assets of the testator's estate are exhausted. But while it enjoys this quality of preference or exemption, it is liable to be adeemed by the act of the testator in his lifetime ; and this liability to ademption is a fair test of the character of the legacy itself.

According to the principles just stated, all the legacies, including those given to the wife, except the pecuniary legacy of $500, directed to be allowed to Mrs. Hemenway, are specific legacies ; and therefore such legacies do not, of course, embrace the after-acquired United States bonds, or lapsed legacies, or any other personal estate or funds of which the testator died possessed ; but such estate or funds make up the residue of the estate, which is subject to be applied to the payment of debts, legacies and charges all kinds, and expenses of administration, to which the estate is liable, to the exoneration of the specific legacies.

But though there is no residuary clause in the will, and the specific legacies do not embrace or exhaust the entire personal estate, the testator did not die intestate as to this residue or surplus, remaining after payment of debts, and any legacy not otherwise provided for, and all the charges and expenses to which the estate was liable. Such surplus or residue devolved on his executrix. And the next question is, what interest did she take in it, if any, other than that of mere executrix for purposes of administration, and how and where is she to account for and distribute this undisposed-of surplus or residue ?

It is contended on behalf of the widow and executrix, that this surplus or residue, undisposed of by any express provision of the will, is by law vested in her as executrix ; and that the Orphans' Court, or the special term of the Supreme Court exercising the jurisdiction of the Orphans' Court, under the testamentary act of 1798, Ch. 101, has no jurisdiction or

power over the subject of this undisposed-of residue; and if distribution thereof is to be made, it can only be made and enforced by a court of equity, in the exercise of its jurisdiction in respect to implied or constructive tests. But to this contention we cannot for a moment yield our assent.

It is true, according to the English testamentary system, *at law*, it had been the rule from the earliest period, that the whole personal estate devolved on the executor, and if, after payment of the funeral expenses, testamentary charges, debts and legacies, there should be any surplus, it would vest in the executor *beneficially*. In equity, however, while the rule was, *prima facie*, the same as at law, yet, it was held in many cases, that the general rule *at law* should be controlled *in equity*, in all cases where a necessary implication or strong presumption arose that the testator meant to give *only* the office of executor, and not the beneficial interest in the residue. 2 Wms. Executors, 1263, 1264, where the cases are compiled. This rule remained unchanged in England until the year 1830. In all such cases, the executor was considered as a trustee for the next of kin of the testator, the trust to be declared and enforced by a court of equity; the theory being that the English ecclesiastical courts had no jurisdiction over such trusts, or, as said in one of the cases, "but a lame jurisdiction." Pamplin v. Green, 2 Cha. Cas. 95; Matthews v. Newby, 1 Vern. 133, 134. And in stating the origin and growth of the jurisdiction in equity, in ingrafting a trust upon the legal estate devolved upon the executor, Lord Chancellor Hardwicke, in Southcot v. Watson, 3 Atk. 227, 228 (in 1745), said that, "ever since the case of Foster v. Munt, 1 Vern. 473, before Lord Chancellor Jefferies, (in 1687) which underwent various fates, the doctrine established in this court has been that where a man makes a will and an executor, *and gives him a legacy*, he to be considered as a trustee merely for the rest of kin, upon an equity founded on the statute of distribution." This doctrine of a court of equity, in raising a trust in favor of the next of kin, was introduced in order to overcome what was regarded as an unjust and inequitable result of allowing the executor to take the beneficial interest in the residue to the exclusion of the next of kin. In some of the early cases it was held that where the wife of the testator was made executrix, and there was a surplus or residue undisposed of, she would take beneficially, upon consideration alone of being wife. This was so held in the case of Ball v. Smith, 2 Vern. 675; and in the leading case of Farrington v. Knightly, 1 P. Wms. 544, 549, before Lord Chancellor Macclesfield. The chancellor, in stating his first impressions of that case, said: "An

executor, from his name, is but a trustee, he being to execute his testator's will, and therefore called an executor. In the present case, the testator is not to be looked upon as dying intestate, but to have made the executor a trustee of the surplus; and this is the reason why the spiritual courts can not compel a distribution, *because they can not enforce the execution of a trust.* Indeed, in the case of a wife, it has been held that where she is executrix *and has a legacy*, and there is no disposition of the surplus, she shall have it; but I do not hear any precedents cited that go further." This was said by the chancellor in giving his first impressions of the case; but, upon further examination and consideration, he held, and produced several precedents to show, that the wife being the executrix made no difference, and that where she *took a legacy under the will*, she should be decreed to make distribution of the surplus among the next of kin. 1 P. Wms. 550, and the cases cited, and the note to that case by Mr. Cox. And in speaking of the reason of the rule, the chancellor said: "That as to the reason of the case, it was most plain, the making of the person executor ought not amount to a gift of the testator's personal estate; it was no more than making him a trustee, the very word executor importing, *ex vi termini*, that he was only appointed to execute the will, and to have nothing but the management of the personal estate."

The question of the right of executors to appropriate to themselves the undisposed-of surplus or residue of the personal estate of their testators gave rise to much perplexing and expensive litigation, and the state of the law upon the subject became very unsatisfactory, and was frequently the subject of severe animadversion by the equity judges. See cases of Urquhart v. King, 7 Ves. 225, and Pratt v. Sladden, 14 Ves. 193, 197. And to correct what was conceded to be an unjust and unsatisfactory state of the law upon this subject in England, the statute of 11 Geo. 4 and 1 Wm. 4, was passed. By that statute it was declared that any person appointed an executor shall be deemed by the courts of equity to be a trustee for the person or persons (if any) who would be entitled to the estate under the statute of distributions, in *respect of any residue not expressly disposed of*, unless it shall appear by the will or codicil that the person so appointed executor was intended to take such residue beneficially.

The principle that obtained in the English law prior to the passage of the statute just referred to, never had force or recognition in the jurisprudence of Maryland, and consequently, it never had force or recognition as any part of the law of this District. Indeed, we think we are justified in stating that

such principle never formed part of the American law, and hence Mr. Justice Story was well warranted in laying it down as clear that "in America the surplus is by law universally distributable among the next of kin, in the absence of all contrary expressions of intention by the testator." 2 Sto. Eq. Jur. Sec. 1208.

The executor, as is well understood, derives his title as executor from the will of the testator, but he takes no beneficial interest in the undisposed-of surplus or residue of the personal estate, by mere implication or construction, as by the former English Rule. It is true every executor is, in a certain sense and to a certain extent, a trustee for all persons interested in the preservation and distribution of the personal estate of the testator, and he is equally so in respect to the surplus or residue of the estate undisposed of by the will, as of any other portion of the estate. He takes the estate under the will for purposes of administration, and of distribution to those entitled; and while a court of equity has a long established jurisdiction in all matters of trust, of account, of administration, and of construction, in the settlement of estates, yet such jurisdiction is not exclusive of the very ample jurisdiction conferred on the Orphans' Courts of Maryland, and the special term of the Supreme Court of this District for Orphans' Court business, by the testamentary act of 1798, ch. 101. That act embodies in its various provisions a testamentary and administrative system, intended to be complete in itself. It is by no means limited and restricted in the general scope of jurisdiction conferred on the Orphans' Court, to the limited powers and jurisdiction of the spiritual courts of England, as formerly exercised, in respect to testamentary matters. The title of the act plainly indicates its general scope and policy. The title is "An act for amending and reducing into one system, the laws and regulations concerning last wills and testaments, the duties of executors, administrators and guardians, and the rights of orphans and other representatives of deceased persons." In an act so comprehensive as that of 1798, intended to embrace the whole law of administration of decedent's estates, if it had been the intention of the legislature to exclude the jurisdiction of the Orphans' Court in respect to the surplus or residue of the personal estate of the deceased, undisposed of by his will, and to confide that jurisdiction exclusively to a court of equity, and thus, in such case, to divide the administration between two tribunals, we should certainly find some provision in the statute relating to such an exception from the jurisdiction of the Orphans' Court. But nothing of the kind appears in the act. The

only provision to be found in the act that has reference to the right or interest of the executor in the residuary estate of the deceased, is found in Sec. 6, Sub. Chap. 9. By that section, if the executor be a *residuary legatee*, he may be excused from returning to the court an inventory or account, upon giving bond for the payment of all debts and claims against the estate, and for the payment of all legacies given by the will. But it is very plain that this provision contemplates the case of an express residuary bequest to the executor, and not a right to such residue or surplus undisposed of, arising alone by implication or construction of law.

An inference is sought to be drawn, and as showing that the Orphans' Court was not intended to take cognizance and make distribution of such residue or surplus, from the fact that in the Subch. 11, and the sections of that subchapter, providing for the distribution of an intestate's estate, the word "executor" does not appear. But that fact can furnish no material inference in support of the contention of the appellee. There is no lack of provision in the act conferring power and jurisdiction upon the Orphans' Court to make and enforce distribution of the residue of a testator's estate which has not, by any express terms of his will, been disposed of: the power and jurisdiction of that court being ample to superintend and direct full and complete administration of as well the estates of testators as those of intestates. By Sec. 21 of Subch. 15, the Orphans' Court is instituted "for the purpose of taking the probate of wills, granting letters testamentary and of administration; *directing the conduct and settling the accounts of executors* and administrators, securing the rights of legatees, superintending the the distribution of the estates of intestates, securing the rights of orphans and legatees, and *administering justice in all matters relative to the affairs of deceased persons according to law.*" And further, by Sections 6 and 10 of Subch. 10, relating to the duties of executors and administrators, it is, by the first of these sections, provided, that it shall be the duty of an executor, upon the settlement of his account showing that all debts and claims are paid, to deliver up the estate in his hands to those entitled to receive it; and by the next of these sections, it is made the duty of an administrator, upon the settlement of his account, showing the debts and claims all to be paid, to deliver up and distribute the surplus or residue of the estate as therein directed. And by Section 12, of Subch. 15, among other things, it is provided, that "The Orphans' Court shall have full power, authority, and jurisdiction, to examine, hear and decree upon,

all accounts, claims, and demands, existing between wards and their guardians, and between legatees, or persons entitled to any distributable part of an intestate's estate, and executors and administrators, and may enforce obedience to, and execution of, their decrees, in the same ample manner as the court of chancery may."

These provisions of the statute are certainly ample to confer authority and jurisdiction upon the Orphans' Court, or the special term of the Supreme Court exercising the jurisdiction of the Orphans' Court, to direct and enforce the distribution of the undisposed-of residue of the personal estate of the testator, in this case; and we are clearly of opinion, that the executrix, the widow of the deceased, did not take, by any construction of the will, any beneficial right or estate in such undisposed-of residue, as distinguished from her title merely as executrix; and that such undisposed-of residue must be distributed to the next of kin of the testator.

2. The next question is that raised by the exception to the allowance of the commission to the executrix.

It is objected in the first place, that no allowance of commission should have been made, because the specific bequest of the City of Richmond bond, for $5,000, was bequeathed by way of compensation for all trouble and services to be rendered by the executrix in the administration of the estate; and in the second place, if such specific bequest was not intended as such compensation to the executrix, the rate of commission allowed was excessive and unreasonable.

We are of opinion that neither of these objections can prevail. The bequest of the Richmond bond was to "my wife and executrix," without other designation, but nothing to indicate that it was given by way of compensation, and to be taken in lieu of commissions. The descriptive words used to designate the legatee were entirely natural and proper, and were clearly intended as mere *descriptio personæ* of the legatee; and if the wife had failed to obtain letters testamentary, she would, doubtless, have taken the legacy, notwithstanding her failure to become executrix by qualification. This legacy, therefore, can not be treated as compensation in the place and stead of the commission allowed by law. The terms of the bequest will not bear any such construction.

Nor can the objection that the rate of commission is excessive and unreasonable be available to the appellants on this appeal. The statute, by its terms, declares that the commission to be allowed to the executor or administrator shall be, *at the discretion of the court*, not under five per cent. nor exceeding ten per cent. on the amount of the inventory

or inventories, excluding what is lost or hath perished." Act 1798, Ch. 101, Subch. 10, Sec. 2. This provision of the statute, having fixed a minimum and maximum rate of commission to be allowed to executors and administrators, and vested a discretion in the Orphans' Court, restricted only by those limits, an allowance by that court, or court exercising its powers and jurisdiction, within those limits, is conclusive, and therefore not the subject of review in an appellate court. This has been uniformly held by the Court of Appeals of Maryland, in cases where this question on this statute has arisen. Wilson v. Wilson, 3 G. & J. 20; Gwynn v. Dorsey, 4 G. & J. 453; McPherson v. Israel, 5 G. & J. 60; Thomas v. Frederick Co. School, 9 G. & J. 115. The court below was therefore clearly right in overruling the exception to the commission allowed the executrix.

3. Then, as to exceptions to the allowances for the price paid for cemetery lot in Rock Creek Cemetery, at this city, and the price paid for monument placed over the grave of the deceased. The statute provides for the allowance for funeral expenses of the deceased, at the discretion of the court, not to exceed $300. In this case $268.50, were paid the undertaker as funeral expenses. The allowance made of $317 for lot in cemetery, and $575 for monument placed on the lot, are charged and allowed as distinct claims for expenditure incurred for the interment of the deceased. If this were the case where creditors were prejudiced by the allowance of these expenditures, or even legatees whose legacies were lessened by the allowance, the exceptions might receive different consideration.

But this is not such case. The case here is one where the deceased has left a considerable estate, but no children or descendants; and his estate goes to his surviving wife and certain collateral relations. He occupied in life a respectable position in society, and was entitled at his death to such funeral obsequies and respectable interment as accorded with his position and circumstances in life. He was entitled to be buried in the cemetery, and to have his grave marked and distinguished with such monument as is customary with persons of his position and estate. To inter his body in a cemetery, the usual place of interment, it was necessary that a lot should have been purchased, and improved, and distintinguished by a suitable monument, to make it conform to its environment, at least to a certain degree. The expenses incurred for these purposes were not strictly funeral expenses; certainly not within the sense and meaning of the provision of the statute, which limits funeral expenses to an amount not to

exceed three hundred dollars. It does not appear that there was any extravagance in the expenditure for these objects, and we can not say that there was error in allowing credits for the amounts claimed in respect to them by the executrix. It would seem to be an ungracious act, on the part of the exceptants, deny a[illegible] object to the right of the widow and executrix of the testator, to place over the grave of the latter a lasting memorial structure, at the expense of his own estate, simply because it may lessen to a small extent the amount of distribution that they would otherwise receive. If it were shown that such expenditure was extravagant, and for inappropriate objects, quite another question would be presented; but there is nothing to show any such state of case.

4. And lastly, with respect to the exception to the sale by the executrix of the $1,500 United States bonds, we think there is nothing in the case to support the exception. If the bonds had been of denominations capable of specific delivery, and the legatees had desired such delivery, it would have been the duty of the executrix to have delivered the bonds. But it appears the legatees were content to have the bonds sold and to receive the money therefor, and they did receive the money and receipted to the executrix for it. They can not now be heard to urge an objection to the sale.

It follows from what we have said, that the order of the court below, of the 11th of October, 1898, approving and passing the account of the executrix, must be reversed, and the cause be remanded, that the account be re-stated in accordance with the principles of the foregoing opinion; and it is so ordered.

Order reversed and cause remanded.

No. 66.

MARY LOUISE KENADAY, Executrix,
Plaintiff in Error and Appellant,
v.
ARABELLA D. SILENOTT, et al.

In Error to and Appeal from the Court of Appeals of the District of Columbia.

BRIEF FOR PLAINTIFF IN ERROR AND APPELLANT.

WM. HENRY DENNIS,
Attorney for said Executrix.

Washington, D. C.
Gibson Bros., Printers and Bookbinders.
1900.

8366

Supreme Court of the United States.

OCTOBER TERM, 1900.

MARY LOUISE KENADAY, EXECUTRIX,
Plaintiff in Error, and Appellant,

v.

ARABELLA D. SINNOTT, ET AL.

No. 66.

In Error to and Appeal from the Court of Appeals of the District of Columbia.

Brief for the Executrix, Plaintiff in Error and Appellant.

I. STATEMENT OF THE CASE.

This case results from sundry proceedings directed against the widow and executrix of Alexander M. Kenaday, deceased, by his next of kin, in what is practically the orphans' court of the District of Columbia, now known as the special term of the Supreme Court of said District for orphans' court business.

Alexander M. Kenaday, a prominent veteran of the

Mexican war, and a claim agent (but not a lawyer), died in Washington on or about March 25, 1897, leaving a widow, Mary Louise Kenaday, and no children or descendants.

He left a last will and testament (1) somewhat inartificially drawn, and showing individual peculiarities of expression, the plain intention of which was to dispose of *all* his property, by giving substantial legacies to his next of kin, and to give his other property to his "beloved wife," whom he appointed sole executrix.

She promptly paid the legacies to the next of kin (5) except in the case of one who had died, and another, of whom it is still uncertain whether he is alive or dead (5).

In June, 1898, she published the usual "final notice" preparatory to closing the estate (4) which was responded to by a claim from the present defendants in error or appellees, in the form of a petition to the court (5) for the distribution to them of certain assets alleged to be "not disposed of by the will."

The executrix filed her final account, showing a distribution of these assets to herself as legatee (7–8); the appellees excepted on that and other grounds (9); the executrix answered the exceptions (11), and her account was approved by Mr. Justice Hagner, an able jurist of long experience in the existing testamentary law of Maryland and the District of Columbia.

The appellees in the case at bar then appealed to the Court of Appeals of the District of Columbia (13) which sustained the executrix and the orphans' court as to all the exceptions save one (with a severe censure of the spirit displayed in some of them), but held that some part of the personal estate was not disposed of by the will, and could be distributed by the orphans' court to the next of kin. Its opinion is reported in 27 Wash. Law Reporter,

82, and 14 D. C. Appeals, 1 (*Sinnott* v. *Kenaday*), and is annexed to this brief.

The case was necessarily remanded to the court of first instance to state a new account in accordance with the opinion and mandate (13), was referred to the register of wills for that purpose (15), affidavits as to the facts were filed by the next of kin (15–16), and the register stated an account (17) to which the executrix objected and excepted (18), but which was passed by the justice then holding the orphans' court.

This account narrowed the issue to the question of the distribution of a balance of $8,285.64 (18), claimed on one side by the widow, and on the other by the next of kin, and some errors of accounting (19).

The executrix then appealed (20) to the Court of Appeals for the purpose of bringing the matter to this court, and that court, in a summary way, approved the account stated by the register of wills as being "stated in accordance with the mandate" (25).

Some doubt being then raised whether an appeal or a writ of error would be the proper method of carrying the case to this court, the Court of Appeals allowed both (28). This was made the basis of a motion here to dismiss the case, at the last term, which was laid over by the court to be heard at this time.

II. Specification of Errors.

The executrix respectfully submits that the Court of Appeals of the District of Columbia erred—

1. In holding that the justice of the Supreme Court of the District of Columbia, holding the special term for orphans' court business, has jurisdiction to order and compel a distribution by an executrix to the next of kin

of the testator, of a sum in the hands of the executrix alleged to be not bequeathed to any one by the will, and in overruling the contention of the executrix that such a question is exclusively within the cognizance of equity or chancery.

2. In deciding that the justice holding said special term had jurisdiction to construe the will of said testator for the purpose of arriving at the conclusion mentioned.

3. In holding that the judicial construction of the will of said testator should be that he failed to bequeath the beneficial interest of part of his personal estate, to wit, sundry United States bonds, instead of holding that said bonds passed to his widow, as "evidences of indebtedness."

4. In holding that the widow was not entitled at least to one-half of an residue of personal estate not bequeathed by testator.

5. In ignoring and thereby overruling the objections and exceptions of the executrix to the account stated by the register of wills, dated February 10, 1899.

6. In affirming the order of the orphans' court, dated February 10, 1899, approving the account termed the final account of this estate.

III. Argument.

The first question which arises and one which will be of importance in other cases of the same nature as this, is the question of

Jurisdiction.

To this point the Court of Appeals directs a large part of its opinion, and incidentally thereto not only sets aside the English doctrine as to the respective jurisdictions of

probate and chancery, but also, as it appears to counsel for the executrix, virtually attempts to repeal an established part of the common law, as inherited by us from England, a task which can properly be accomplished only by a statute for that purpose. This is the doctrine that a balance of personal property not disposed of by the will must remain vested in the executor beneficially unless a *court of chancery* sees reason in the will for decreeing him to be a trustee for the next of kin.

The only authority cited by the Court of Appeals for its rather surprising utterance on this subject is a passage from 2 Story's Eq. Jur., sec. 1208, where he says that "in America the surplus is by law universally distributable among the next of kin, in the absence of all contrary expressions of intention by the testator."

But it is apparent from the cases cited by Justice Story that in saying "by law," he means "by *statute* law," as in his own State of Massachusetts, where an act for the purpose was passed in 1783; otherwise the doctrine of the common law would prevail there.

Hays *v.* Jackson, 6 Mass. 149.

Mr. Schouler in his work on Executors, sec. 494, expresses the idea more fully and with less danger of misinterpretation, when he says that *American statutes* one hundred years old "repudiate the notion that a beneficial interest vests in the executor."

The Court of Appeals, however, in its opinion on the former appeal, says (1 App. Cas. D. C. 21):

> "The principle that obtained in the English law prior to the passage of the statute first referred to (11 Geo. IV and 1 Wm. IV) never had force or recognition in the jurisprudence of Maryland."

This appears to mean only that no reported case can be found in which the principle of the right of an executor to a residue is decided in Maryland. But it is submitted that this is a most dangerous and undesirable test to apply at this late day to a doctrine of the common law in any State, especially by a court in another jurisdiction. Because a principle is so well established that no one has ever seriously contested it and obtained a reported adjudication from the highest court, would seem to be a reason for considering it in force, not the contrary. Otherwise the courts might repudiate at this late day a number of the subordinate doctrines, at least, of the English common law, on which counsel have advised and parties have acted in confidence since early times. Maryland is one of the less populous States, and litigation there and the resulting reported cases are not so plentiful as elsewhere. It might easily happen that many of the doctrines of the common law would not be found expressly affirmed in any reported case in Maryland, especially in the early judicial history of the State, when reports were meagre. Surely the courts should not be at liberty suddenly to strike down one of these doctrines, and thereby deprive the inhabitants of the District of Columbia in part of that guarantee found in the third section of the Maryland "Declaration of Rights," namely:

> "That the inhabitants of Maryland are entitled to the *common law of England*, and the trial by jury according to the course of that law, and to the benefit of such of the English statutes as existed at the time of their first emigration, and which by experience have been found applicable to their local and other circumstances, and of such others as have been since made in England or Great Britain, and have been introduced, used, and practiced by the courts of law

> or equity; and also to all acts of assembly in force on the first of June, seventeen hundred and seventy-four, except such as may have since expired, or have been, or may be altered by acts of convention, or this declaration of rights."
>
> Comp. Laws, D. C., page 644.

Although this dictum of the Court of Appeals is made in a measure only argumentatively, and in reference to jurisdiction, not to the merits of the case, still it is of such importance, and seems to be of such a tendency to unsettle much law regarded as established, that it is submitted that it would be unfortunate if it were passed over with even tacit approval by the court of last resort, and that, on the contrary, the doctrines of the common law ought to be upheld as in force until repealed by statute, not by the courts.

But even apart from the foregoing, the executrix respectfully contends for this principle, viz:

The enforced distribution of any residue in the hands of an EXECUTOR, after payment of debts and legacies, is exclusively within the jurisdiction of equity or chancery, and the doctrine is unknown in any other court.

Pettit *v.* Smith, 1 P. Wms. 7.

Hatton *v.* Hatton, 2 Strange, 865.

2 Wms. on Exrs. 1st ed., *1270.

This fact is thus explained in 2 Williams on Executors, 1st ed., *899–899:

> "At law, it has been the rule from the earliest period, that the whole personal estate devolves on the executor; and if, after payment of the funeral expenses, testamentary charges, debts, and legacies, there shall be any surplus, it shall vest in him beneficially. Atty. Gen. *v.* Hooker, 2 P. Wms. 340;

Southcot *v.* Watson, 3 Ark. 228; Urquhart *v.* King, 7 Ves. 228.

"In equity, *prima facie*, the rule has been the same as at law. The numerous cases upon the subject must be considered as having established the general rule that the executor, by the mere force of the appointment, should take all the undisposed of residue of the personal estate, as well beneficial as legal. (Lowndes on Legacies, 249, 250.) But this general rule has been controlled *in equity*, in all cases where a necessary implication or strong presumption has appeared, that the testator meant to give only the office of executor, and not the beneficial interest in the residue. In all such cases, the executor has been considered a *trustee* for the next of kin of the testator; or, in cases where no next of kin can be found, for the Crown. Middleton *v.* Spicer, 1 Bro. C. C. 201."

And, again, in 2 Williams on Executors, *1270, it is said:

"According to the statute of distributions the Ecclesiastical Court has authority to enforce the distribution of an *intestate's* effects; and, as the act of parliament contains no negative words, equity has, in this matter also, a concurrent jurisdiction with the ordinary.

"But *equity* has an *exclusive* cognizance of those cases in which there is an executor and the residue is undisposed of; for then the executor is a trustee for the residue; and the ordinary cannot compel a distribution of it, because he cannot enforce the execution of a trust." Pettit *v.* Smith, 1 P. Wms. 7; Hatton *v.* Hatton, 2 Stra. 865.

In Pettit *v.* Smith, 1 P. Wms. 7, and Hatton *v.* Hatton, 2 Strange, 865, already cited, writs of prohibition were granted against the spiritual court in such cases.

Moreover, in the subsequent act of 1 Wm. IV, c. 40, limiting the right of executors to retain a surplus undisposed of by will, parliament expressly recognizes the exclusive jurisdiction of chancery in such a case and directs that in the specified cases "executors shall be *deemed by courts of equity* to be trustees," etc.

2 Wms. on Exrs. *899.

This shows the doctrine of chancery as we derived it from England.

Those who framed the Maryland Act of 1798, chap. 101, which is the testamentary code of the District of Columbia, showed themselves be thoroughly conversant with the old English chancery system. Where they desired to change it they did so in express words. Thus, they knew even the point of detail that under the English practice, for technical reasons, an order of court was necessary to grant leave to take an executor's bond into another court to sue upon it, and they dispensed with that formality, as follows:

> "Any bond executed by an executor or executrix, or an administrator or administratrix, as hereafter mentioned, shall be recorded in the office of the register of wills, where administration is granted, and any person conceiving him or herself interested in the administration of the estate, *shall be entitled to, and have on demand, a copy of such bond*, and a certificate from the register, under his hand and the seal of his office, upon which copy and certificate an action may be maintained, in the name of the State for the use of the party interested, and judgment may be recovered upon such action for the damage actually sustained."
>
> Md. Act of 1798, c. 101, sub. c. 3, sec. 10.

At the same time they guarded against unauthorized

innovations by this strong declaratory clause near the end of the act:

> "The said orphans' court shall not, under pretext of incidental power or constructive authority, exercise *any jurisdiction whatever* not *expressly* given by this act or some other law.'
>
> Md. Act of 1798, c. 101, sub. c. 15, sec. 20.

And in the body of the act occurs also this reservation:

> "Nothing in this act contained shall be construed to affect the general superintending power exercised by the court of chancery with respect to trust."
>
> Md. Act of 1798, c. 101, sub. c. 12, sec. 16.

So the framers of the act of 1798 must have been familiar with the well-known and long-established doctrine about the distribution of a surplus in the hands of an executor by the equity court. If they had thought best to change it, they would have done so in express words. But the orphans' court they established, composed of three laymen or justices of the peace, was not well adapted to considering complicated questions. The act therefore left the matter, as before, in the exclusive jurisdiction of the equity court, which is so much better adapted to deal with it than the orphans' court, that it seems strange that in the present case the next of kin did not resort to their undoubted right to apply to the equity court for relief, instead of raising the question of jurisdiction in the orphans' court.

If there were a transfer of the jurisdiction, it would naturally be found in our "Statute of Distribution," which is sub-chapter 11 of the Maryland Act of 1798. But that sub-chapter is closely a re-enactment of the English "Statute of Distribution," 22 and 23 Chas. II,

ch. 10, and applies only to an ADMINISTRATOR having in charge the goods of an INTESTATE.

Where a testator, as in this case, appoints an executrix, he does *not* "die intestate" as to any part of his personal property, for the legal title to all of it vests in the executrix, subject only to the obligation of paying debts and legacies.

Story, Eq. Jur., § 1208.
Hays *v.* Jackson, 6 Mass. 149.
Lowndes on Legacies, 249, 250.
Sinnott *v.* Kenaday, 1 App. Cas. D. C. 18.

The statute of 22 and 23 Chas. II, ch. 10, was in force when the decisions were made, that the courts corresponding to our orphans' court had no jurisdiction to compel an executor to distribute a balance not bequeathed. By re-enacting it, by a familiar principle of statutory construction, the decisions upon its meaning also became law.

23 Am. and Eng. Cycl. Law, 370.

Said sub-chapter 11 is headed, in Kilty's official edition, "Distribution of an *intestate's* personal estate." It provides that when "all the debts of an *intestate*" shall have been discharged or settled, etc., "the *administrator* shall proceed to make distribution of the surplus." The word "intestate" occurs a dozen times in the sub-chapter, and "administrator," several times; but the word "testator" or "executor" is never mentioned therein.

In sub-chapter 15, above cited, section 12 gives power to decide disputes "between *legatees*, or persons entitled to any distributable part of an *intestate's* estate and executors and administrators;" but the present comes under neither of those heads. The appellants allege

that there are *no* "legatees" of the surplus they claim, and, as just shown, Alexander M Kenaday was not an "intestate" as regards his personal property, for he left a testament appointing an executrix. The grant of chancery powers to orphans' courts, in the same section, is merely to "enforce obedience to and execution of their decrees," that is, an *adjective* and not a substantive grant. It certainly does not give them all of the chancery jurisdiction.

It is submitted that the merely general declaratory clauses quoted from the act of 1798 by the learned Court of Appeals are not sufficient to change well-established boundaries of jurisdiction. In relying upon them, that court is allowing the orphans' court to exercise "incidental power" or "constructive authority," and not "jurisdiction expressly given,"—in violation of the act of 1798. The very lax construction given to these clauses by that court would apparently, with equal force, allow the orphans' court to entertain a suit against an executor for a debt, or replevin by him for part of the assets of the estate, or many other suits admittedly beyond its jurisdiction.

United States *v.* Walker, 109 U. S. 258.
Keyser *v.* Breitbarth, 3 Mackey, 19.
Re Thompson's estate, 6 Mackey, 536.

It is submitted, therefore, that in its anxiety to grant relief and deal practically with this case, the learned court below has fallen into at least two grave errors on the subject of jurisdiction, which, if uncorrected, might unsettle much of the law hitherto regarded as established. Its error in regard to over-extending the jurisdiction of the orphans' court, it is submitted, is in the same direction as that specially noticed by this court in *Campbell* v. *Porter*, 162 U. S. 489, referring to *Barbour* v. *Moore*, 4 App. Cas. D. C. 535.

Moreover, probate courts have no general power to construe wills.

Fiester *v.* Shepard, 92 N. Y. 25.

Construction of the Will.

Coming to the merits of the case, it is submitted that even if it had been begun by the next of kin in proper form, that is to say, by a bill in equity, which would have settled all the doubtful questions about a missing nephew, etc., yet the next of kin could not prevail, in face of the natural, obvious, and reasonable construction of the will.

The rule of construction particularly applicable is that laid down by Jarman as No. 16, viz:

> "That words, in general, are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another can be collected, and that other can be ascertained; and they are, in all cases, to receive a construction which will give to every expression some effect, *rather than one that will render any of the expressions inoperative;* and of two modes of construction, that is to be preferred *which will prevent a total intestacy.*"

This rule has been strongly sustained by this court in a number of important cases.

Given *v.* Hilton, 95 U. S. 594.
Patch *v.* White, 117 U. S. 210.
Lee *v.* Simpson, 134 U. S. 572.
Hardenbergh *v.* Ray, 151 U. S. 112.
Home for Incurables *v.* Noble, 172 U. S. 383.
See also Colton *v.* Colton, 127 U. S. 300.

The other rule is that a widow who has relinquished her *pars rationabilis* or thirds of the personal estate, and

accepted the provision made for her by her husband's will, has a much stronger claim to a liberal construction in her favor than the heir at law has against a devisee, or next of kin against a legatee, inasmuch as she is *a purchaser for a fair consideration.*

This is strongly and emphatically declared in Durham *v.* Rhodes, 23 Md. 233, 242, as follows:

> "A widow, to whom a general bequest is made by her husband in lieu of dower, is a purchaser of that which she takes under the will with a fair consideration. 1798, ch. 101, sub-ch. 13, sec. 5; 1 Rop. on Leg. 297; Snively *v.* Bevans, 1 Md. 223; Gibson *v.* McCormick, 10 G. & J. 113, 114; Mantz *v.* Buchanan, 1 Md. Ch. 205. In this State, every devise of land or bequest of personal estate to a widow, unless otherwise expressed in the will, shall be construed to be intended in bar of her dower in lands or share of the personal estate respectively. 1798, ch. 101, sub-ch. 13, secs. 1, 2, 3. And if such a devise be assailed by creditors as unjust or injurious to them, and in fraud of their rights, she will be allowed full satisfaction for her dower. Hall's Case, 1 Bland. 204, 205, and Gibson *v.* McCormick, 10 G. & J. 113. In such case the widow does not take by way of bounty, or as a donee or volunteer, but as a meritorious purchaser and contractor.
>
> "A general legacy to a widow, in lieu of dower, accepted by her, stands upon a different footing from other general legacies merely voluntary. It will be entitled in the payment of it, to a preference over such general legacies, even where the amount of the bequests exceeds the value of her dower; for in this matter, the testator is the only and best judge of the price at which he purchased it. 1 Rop. on Leg. 297, 298; Burridge *v.* Bradye, 1 P. Wms. 127; Blower *v.* Moret, 2 Ves. Sen. 420; Davinhill *v.* Fletcher, Amb. 244.
>
> "The widow, therefore, being not only a legatee,

but a favored purchaser for a fair consideration, whose legacy is not to abate in favor of other general legacies, simply voluntary, how does she stand in regard to a fund, to which a creditor of the testator can resort by virtue of a lien, but whose claim, as a debt against the deceased, she discharges?" [It was held that she was entitled to subrogation.]

The principle, that the comparative values of what is relinquished and gained by the wife make no difference in the application of the rule is declared by the Supreme Court of the United States.

Sykes *v.* Chadwick, 18 Wall. 141.

Frame of the Will.

The will of Col. Kenaday (1) was not written by any testamentary lawyer or with technical skill. It has an individuality arguing strongly that it was written by himself.

It begins with a declaration that he does not intend to die intestate, for he speaks of "directing how the *estates*" (evidently meaning all the property, real and personal), which it has pleased God to bless him with, shall be disposed of.

The testator then directs that all his just debts and funeral charges shall be paid out of his estate by his executrix, who is thereinafter declared to be his wife.

With evident anxiety to provide for her whom he declares to be "my beloved wife, Mary Louise Kenaday," he then proceeds with minuteness in that behalf, mingling together legally sufficient words of gift, with explanations, memoranda, and advice for her guidance, as each topic occurred to his mind.

Thus, he gives her "all my real estate," then inserts

abruptly "household furniture," then adds, "and claims pending in the courts in relation to said real estate, to wit," but this "to wit" is followed by an enumeration of the real estate itself, with a suggestion or limitation in regard to the way she can convey it. Then he inserts rather needlessly the word "Item," which, however, does no harm, since it means only "also" or "likewise," and is used conjunctively (Bouv. Law Dict., tit. "Item,") and goes on to describe the "claims pending in the courts" he has already bequeathed. The peculiarity of punctuation visible in the will, as in this clause, shows that the testator sometimes disjoined what he meant to be read conjunctively.

He then resumes with the word "Also," which by all the rules of law, grammar, and common sense applicable to wills or any other instruments, refers back to the governing verbs of this whole passage in the will, namely, "I give, devise, and bequeath to my beloved wife Mary Louise Kenaday." Any other interpretation, which would reduce what follows to a mere idle enumeration of property, without any disposition of it to any one, would be so strained, forced, and unnatural, and so opposed to the canons laid down by Jarman and all other writers, that it does not seem necessary to discuss it. The question is rather what passes to Mrs. Kenaday under this clause. The testator mentions the following:

> "My business as a claim agent and as publisher of 'The Vedette,' together with all books, papers, files, office furniture, &c., &c.
>
> "Also 200 shares of Sutro Tunnel stock and Comstock bonds.
>
> "Also notes and evidences of indebtedness to me *of more or less value.*
>
> "Also deposits of currency entered on my bank-

book of the National Metropolitan Bank, amounting to $10,000, *more or less.*"

The testator then makes a handsome legacy of $12,000 in United States bonds to his sister, Mrs. Sinnott (the leader in these attacks upon the widow and executrix), and it appears that these bonds were promptly delivered, with the accrued interest, in a few months after the testator's death (5).

He then provides for the surviving children of a deceased sister by legacies of moderate amounts, pointing out merely, as the executrix construed the provision, to which construction the legatees assented by their receipts, the fund from which they should be paid. These also were paid promptly (5). It may be observed that the testator mentions the residue of four per cent. bonds as $3,500, but bequeaths only $3,000.

It is "as clear as the noonday sun" that the foregoing was all the testator intended for said sister and children of a deceased sister, who resided at a distance from him.

The testator then gives directions to his executrix to pay a Mrs. Hemenway $500 in settlement of an account.

He then seems to recall that he has a City of Richmond bond on special deposit in the same bank with his 4 per cent. bonds, and he jots down in a merely *declaratory* clause that said bond "is hereby devised and bequeathed to my wife and executrix," which is perfectly true, regard being had to his bequest already made to her of "evidences of indebtedness."

Then, a sum advanced to one McGeorge, in California, "is hereby devoted to the relatives of my wife, and used according to her discretion."

The will, therefore, closes as it opens, with a reference to his wife, who is the object,—not of his "bounty," for

such a provision for a widow is not bounty, but the performance of a legal and moral obligation,—but of his loving solicitude, a solicitude which his collateral relations are now striving to defeat.

Distribution of the Estate.

At the death of testator the deposits in the National Metropolitan Bank, instead of $10,000, were found to be only $810.60. But to this amount the widow was certainly entitled as a legacy (2).

The United States bonds, instead of $15,500, amounted to $24,500 (7).

It has been suggested as a conjecture that the testator took over $9,000 from bank and invested it in $9,000 of these bonds. If so, it only tends to show all the more that the widow should not be deprived of these bonds on a technicality, unless the court were absolutely constrained to such a harsh result; and such is not the case.

On the contrary, the executrix and widow respectfully maintains that all the United States bonds, except those otherwise bequeathed, or used in paying debts and expenses, have vested in her under the general clause bequeathing to her "evidences of indebtedness to me, of more or less value."

If registered bonds of the United States, standing in the name of Alexander M. Kenaday (11) are not "evidences of indebtedness" to him, it seems difficult to say what would be considered such.

It does not appear that there were any other "evidences of indebtedness" for this clause to operate upon, and if the United States bonds be excluded from their scope, these words are rendered inoperative.

The rule in regard to the enumeration of things *ejusdem*

generis is also in favor of this construction, for the testator mentions in the clause immediately preceding this one, "Comstock *bonds*."

It was even argued in the court below that the first part of the will was an enumeration of articles *at the testator's office*. This evidently cannot be sustained. The list begins with the real estate and household furniture of the testator, then takes in claims in court, in the hands of his attorneys, and ends with currency deposited in bank. There is nothing whatever to show that the shares of Sutro Tunnel stock and Comstock bonds were at his office.

It was also suggested that because the Sutro Tunnel stock and Comstock bonds might be regarded as specific legacies, the "notes and evidences of indebtedness" ought also to be so regarded. But the distinction appears obvious. The Sutro stock and Comstock bonds are described by *name*—the others are not. The testator was also careful to give the most general and sweeping effect to the clause about evidences of indebtedness, by adding the words "of more or less value." Some significance should be given to these words.

Nor can it be said that this enumeration is orderly and logical. The testator jumbles together, in a sort of hotch-pot, real estate, household furniture, claims in court, good will of his business and, in fact, almost every class of property. If he did this in regard to property, it is not at all unlikely that he would mingle specific bequests and generic bequests in the same paragraph or part of his will, without regard to any technical rules of construction, of which he was indeed probably blissfully unconscious. As already said, therefore, it seems doubly hard to apply technical and rigorous rules of construction as against the wife whom he loved.

This bequest of "evidences of indebtedness" is of the most *generic* character, and not of any specific evidences or kind of "evidences," for none are named. Such generic bequests have been held repeatedly, in England and this country, to pass all the property of that *genus* owned by the testator *at his death*. Here there is nothing limiting the bequest to any specific articles. On the contrary, the indefinite words "of more or less value," like the words "more or less" which closely follow, aid the construction of the whole clause as being most general, as of an amount likely to vary from time to time, and intended to guard against any partial intestacy. The absence of any express mention of a "residue" in a will otherwise so carefully and minutely drawn, is thus explained. Having exhausted all *genera* of his personal estate, the testator foresaw that there would be no "residue." In other words, the will, in favor of the widow, speaks from the date of testator's death, and includes all the "evidences of indebtedness to me, of more or less value," that testator left at his death. It may be worth observing that all these United States bonds are registered in testator's name, and therefore all the more aptly described as evidences of indebtedness "to me."

One of the leading American cases on this subject is *Van Vechten* v. *Van Veghten*, 8 Paige (N. Y. Ch.) 104, 116. In that case the testator directed in his will that his son should be discharged from all notes which he held against him, and from all charges made against him by the testator for loans or advances, and all claims against him for the occupation or rents of certain premises specified. It was held that the son was entitled to a discharge from all such claims against him which existed *at*

the death of the testator, and not merely those which were in existence at the date of the will. Walworth, Ch., observed that this was in the nature of a personal legacy of the sums thus due, and went on to say (p. 116):

> "Although, as a general rule, it is well settled that a will of personal property relates to the time of the death of the testator, both as to the legatees and the subjects of the bequests mentioned in the will, yet in the case of specific legacies, it is sometimes very difficult to ascertain whether he intended to confine the bequests to the subject-matter thereof as it existed at the time of making the will, or as it might exist at the time when such will should take effect by his death. But to take the cause out of *the general rule, that in a will of personal estate, the testator is presumed to speak with reference to the time of his death*, there must be something in the nature of the property or thing bequeathed, or in the language used by the testator in making the bequest thereof, to show that he intended to confine his gift to the property, or subject of the bequest, as it existed at the time of the making of the will." [He cited Gilb. Eq. 87, and 2 Vern. 538, and disapproved Smallman *v.* Goolden, 1 Cox C. C., 329.]

The same principle is sustained in *Gold* v. *Judson*, 21 Conn. 622 (by Ellsworth, J.), and also in *Dalrymple* v. *Gamble*, 68 Md. 523, and in other cases perhaps even more strongly

Turpin *v.* Turpin, Wythe (Va.), 22.
Allen *v.* Harrison, 3 Call (Va.), 289.
Warner *v.* Swearingen, 6 Dana (Ky.), 195.
Means *v.* Evans, 4 Desau (S. Car.), 242.
Dennis *v.* Dennis, 5 Rich (S. Car.), 468.
O'Brien *v.* Edwards, 2 Edwards (N. Y.), 242.
Gilmer *v.* Gilmer, 42 Ala. 9.
2 Wms. on Executors, *885.

1 Jarman on Wills, 5th ed. *319, 326.
All Souls' College *v.* Coddrington, 1 P. Wms. 597.
Wilde *v.* Holtzmeyer, 5 Ves. 816.
Masters *v.* Masters, 1 P. Wms. 424.
Bridgman *v.* Dove, 3 Atk. 201.
Bland *v.* Lamb, 2 J. & W. 399.

In Banks *v.* Thornton, 11 Hare, 176, a bequest of "all the residue of my property which consists of stock" was held to include all stock in the testator's possession at his death.

The courts, in general, are averse from construing legacies to be specific; and the intention of the testator that they should be so, must be clear.

2 Williams on Executors, *741.
13 Am. and Eng. Enc. of Law, 15 (1st ed., tit. Legacies), and cases cited.

Any reasonable construction of a will, consistent with its terms, will be adopted by the courts in order to give it effect to dispose of the testator's *entire* property, instead of holding that he died intestate as to part.

Minkler v. *Simons*, 172 Ill. 323; 50 N. E. Reporter, 176.

It is not necessary that a clause of a will, in order to have the effect of a residuary clause, shall be the last clause, or that it shall contain any technical word such as "residue," and it may be followed, without impairing its effect, by a special bequest, which will be treated as an exception out of it, liable to fall back into it in case of lapse. To limit the effect of such a clause to *part* of the residue, very special words which clearly limit the gift, and show a clear intention to exclude such portion of the

property as fails to pass under other clauses of the will, must be used.

Morton v. *Woodbury*, 153 N. Y. 243; 47 N. E. Reporter, 283.

The learned Court of Appeals seems to have exhausted for the moment its powers of broad construction in enlarging the jurisdiction of the orphans' court, and applied a close and even narrow construction to the legacies to the widow.

By some process of reasoning, which does not seem to be quite fully stated, it reached the conclusion that the clause "also notes and evidences of indebtedness to me, of more or less value," is a *specific* legacy, though it does not say a legacy of *what*. Then, by further applying certain cases in which a definite amount, or a certain stock by name, or stock "now" on hand, is mentioned, it decides that this clause in this will did not speak as of the time of the testator's death, and could not embrace evidences of indebtedness acquired after the date of the will.

It is submitted that even if this strictness and narrowness of construction could be maintained in an otherwise evenly balanced case—as, for instance, between two legatees, or two collateral relations—it is erroneous to employ it where it produces partial intestacy, and also deprives the widow, who is "a purchaser for a fair consideration," of what she has *bought and paid for*.

The testator in this case is in the position of a vendor, and the will is like a bill of sale made by him. The words in it are to be taken most strongly against him, as the one *proferentem*.

A court ought not to be ingenious and astute in defeating the intention of a testator to die testate, and the rights of his widow, but rather the contrary.

AS TO WRIT OF ERROR OR APPEAL.

On this question the executrix craves leave to refer to her brief filed at the last term, at the time of the motion to dismiss or affirm.

As was said by this court in Campbell *v.* Porter (162 U. S. 478, 481):

> "The decision in *Ormsby* v. *Webb* (134 U. S. 47, 64, 65), has since been understood as governing the practice in the District, and evidently guided the course of the plaintiff in error in the present case. Under these circumstances, the question whether the form of bringing up a probate case shall be by writ of error or by appeal does not appear to us to be so important in its consequences that it should now be reconsidered."

The view taken by this court in the cases just mentioned is strengthened, if possible, by the act of June 8, 1898, c. 394 (30 Stat. 435), which provides:

> "SEC. 3. That *all* issues of fact hereafter arising in the Supreme Court of the District of Columbia holding a special term for orphans' court business, including those relating to the execution of the validity of any will or testament, shall hereafter be tried before said justice holding said special term, and that when required for such purpose jurors shall be drawn in the manner now by law provided for the drawing of jurors for service at the special term of the Supreme Court of the District of Columbia sitting as a Circuit Court for said District."

This distinguishes the orphans' court more than ever from a court of equity and shows that it is a court of law.

Respectfully submitted.

WM. HENRY DENNIS,
Attorney for Plaintiff in Error and Appellant.

Supreme Court of the United States.

OCTOBER TERM, 1899.

MARY LOUISE KENADAY, Executrix,
Plaintiff in Error and Appellant,
vs.
ARABELLA D. SINNOTT, et al.
} No. 305.

In Error to and Appeal from the Court of Appeals of the District of Columbia.

BRIEF FOR PLAINTIFF IN ERROR AND APPELLANT AGAINST MOTION TO DISMISS OR AFFIRM.

This case results from the keen anxiety of some collateral relations to deprive a widow of part of the provision for her benefit, and to gain something which the testator never intended them to have.

Mr. Justice Hagner, a learned jurist of long experience in the testamentary law both of Maryland and the District of Columbia, who heard the case in the first instance, overruled all the exceptions to the final account of Mrs. Kenaday, the widow and executrix.

The Court of Appeals of the District of Columbia, on appeal by said collateral relations, likewise overruled their exceptions, with a severe censure of the spirit displayed in them, saving one exception, namely, that in regard to the

distribution of an alleged residue of the estate, consisting of United States bonds.

This difference of opinion on one point, between two learned Courts, in itself disposes of the charge that the executrix brings this case for review before the Court of last resort only for the purpose of "delay." As executrix, she is bound to sustain the manifest intention of the testator, so far as she can legally do so. As widow, she is meritoriously entitled to a consideration of her rights from the highest tribunal having jurisdiction.

Sykes v. *Chadwick*, *18 Wall.*, *141*.

The questions involved are of a substantial nature, and of general interest. They may be reduced to these points on behalf of the executrix:

1. That the Orphans' Court has *no jurisdiction* over an alleged residue of personalty in the hands of an executrix undisposed of by the will, that jurisdiction being peculiar to equity, as a matter of trust, in the absence of any statute to the contrary.

2. That the Court of Appeals erred greatly against the canons for the construction of wills, by holding a generic bequest to be specific, and by construing against instead of favorably to a widow who renounced her legal share, and so as to produce partial intestacy in a case at least doubtful.

Hardenberg v. *Ray*, *151 U. S.*, *112*.

I.

THE WRIT OF ERROR AND APPEAL.

As to the method of bringing the case to this Court, in the form both of a writ of error and an appeal, it was prompted, out of an abundance of caution, by the diligence and ingenuity shown by the parties on the other side and their counsel in seeking to escape from a hearing of the case here upon its merits.

The reasoning of the learned counsel, however, appears to proceed in a circle, that is to say, they argue that the appeal is void, because the case came here upon the writ of error, and the writ of error is void because the case ought to be brought here upon appeal!

If it be necessary to answer this mode of argument, it may be said that the writ of error was applied for and granted under the authority of *Campbell* v. *Porter*, 162 U. S., 478-489. That was a case upon the validity of a testamentary paper; but the Maryland Act of 1798, ch. 101, which is the law of the Orphans' Court in the District of Columbia, provides that *all* controversies in that Court shall be subject to a trial by jury upon an issue or issues, whenever either of the parties shall require it.

The Maryland Act of 1798, ch. 101, sub-ch. 15, provides as follows:

"16. Whenever either of the parties having a contest in the Orphans' Court shall require, the said court may direct a plenary proceeding, by bill or petition, to which there shall be an answer on oath (or affirmation) and if the party refuse to answer on oath (or affirmation, as the case may require) to any matter alleged in the bill or petition, and proper for the Court to decide upon, the said party may be attached, fined and committed, or his property may be attached and sequestered as aforesaid.

17. And on such plenary proceeding all the depositions shall be taken in writing, and recorded; and in case either party shall require, the Court shall direct an issue or issues to be made up and sent to any court of law which may be most convenient, under all circumstances, for trying the same. * * *"

By the recent Act of Congress, approved June 8, 1898, all such issues shall be tried by a jury impaneled *in the Orphans' Court itself.*

It is difficult to see how a statutory court, such as the "Special Term for Orphans' Court business," could be regarded, in any sense, as a court of chancery or equity, from which it is carefully contradistinguished by the statute creating it. The fact that the questions in this case arose upon an account of the executrix does not appear to make this a suit in equity, any more than an action of "account" in a court of common law converts that court into a court of chancery. Nor is the Orphans' Court one of general jurisdiction, sitting at one time as a court of law and at another as court of chancery. But, in order to guard against any defeat of justice upon a mere technicality, and not finding an exactly similar case as authority, the Court of Appeals, D. C., very considerately allowed an appeal as an alternative to the writ of error. This was certainly in aid of substantial justice, and involved no hardship or deprivation of rights to any of the parties, but rather the contrary.

It does not appear ingenuous, in the brief in support of the pending motion (p. 8), to argue that the Court of Appeals considered an appeal to be the proper method in this case, because it came to that Court by appeal. As is very well known, *all* cases, including judgments at law, must be taken to the Court of Appeals, by appeal, under the statute creating that Court.

II.

THE QUESTION OF THE FORMER APPEAL.

As to the arguments in support of the motion, to the effect that this case should have been brought to this Court immediately after the decision on the former appeal therein (14 App. Cas., D. C., 1) it seems sufficient to say that this Court would have dismissed it in the same manner and for the same reasons as the case of *Gilbert* v. *Beneficial Endowment Association*, at October Term, 1898, which was a case remanded by the Court of Appeals, D. C., for the

stating of a further account by the auditing officer of the Court below.

This, by the way, was the first and only appeal by the *executrix*. Two former appeals were taken by the next of kin.

It is submitted that it is obvious from the record that very important discretionary duties were left to the Orphans' Court by the mandate of the Court of Appeals (Record, p. 14.) In directing a distribution of an alleged residue to the "next of kin," the Court of Appeals did not undertake to decide who were the next of kin, or in what proportions they should take, or other essential questions, such as that in reference to the alleged death of one of them (Record, pp. 15 and 16.) The account was entirely recast under the mandate (pp. 7–17).

The authorities cited in support of the motion, to the effect that a second appeal will not lie when the action of the lower court is in accordance with the mandate on the first appeal, apply in cases where the court, whose mandate is thus obeyed, is the court of *last resort* in that case. In this case, the Court of Appeals is an intermediate court; and the Supreme Court of the United States, of course, will only entertain cases where the action of the Court below is final, and leaves only ministerial and not judicial action to be taken by the Court or Courts below.

Lodge v. *Twell*, *135 U. S.*, *232*.
McGurkey v. *Toledo, etc., Ry. Co.*, *146 U. S.*, *536*.

While it is true that the original decision of the Orphans' Court, if affirmed in all respects, would have been final as to the next of kin, it does not follow that its reversal was a "final" decision. A judgment at law in favor of the defendant is final against the plaintiff; but if it is reversed in the Court above that is not a "final" and appealable decision. It only gives the plaintiff the right to a new trial,

after which there may be a further appeal, according to circumstances.

Complaint is made (p. 5) that the opinion of the Court of Appeals on the former appeal is not included in the transcript of record in this case. The answer is that it was part of *another case* in the Court of Appeals, and therefore could not be included or certified in this case. Even if this were not so, the defendants in error or appellees had their remedy by certiorari, to require it to be sent up. The executrix always intended to print it as an appendix to the brief in her behalf, for the convenience of this Court, and it is now printed as an appendix to this brief.

It is respectfully submitted that, so far from its being shown that this case should be summarily dismissed or affirmed, it appears that it is deserving of full argument and consideration when it is reached in its regular order.

WM. HENRY DENNIS,

Attorney for Plaintiff in Error and Appellant.

Court of Appeals of the District of Columbia.

ARABELLA D. SINNOTT ET AL., APPELLANTS,

v.

MARY LOUISE KENADAY, EXECUTRIX.

WILLS; UNDISPOSED OF RESIDUE; DISTRIBUTION; ORPHANS' COURT; EXECUTOR'S COMMISSIONS; ALLOWANCES FOR BURIAL EXPENSES.

1. Where a testator bequeaths to his wife, who is named as executrix, a particular class of claims, and also his business as a claim agent, and as publisher of a periodical, with all books, papers, files, etc.; also 200 shares of certain stocks, also notes and other evidences of indebtedness "of more or less value," and deposits of currency entered on his bank book at a certain bank, the bequests are specific, and will not include U. S. registered bonds acquired after the date of the will, or lapsed legacies, or other personal estate of which the testator died possessed.
2. In such case, where the will has no residuary clause, the undisposed of residue devolves upon the executrix, who however takes no beneficial interest therein, but the same is distributable to the next of kin of the testator.
3. Under the Act of Maryland of 1798, Ch. 101, the Supreme Court of the District, holding a special term for Orphans' Court business, has power and jurisdiction to make and enforce distribution of such undisposed of residue of the personal estate of the testator.
4. That the will makes a specific bequest of certain bonds to "my wife and executrix," will not deprive her of commissions where there is nothing to indicate that it was given by way of compensation as executrix and in lieu of commission.
5. An allowance by the Orphans' Court of commissions to an executrix, within the limits prescribed by the Act of Maryland of 1798, is conclusive, and not subject to review in an appellate court.
6. An allowance to an executrix of credit in her account for expenses incurred in the purchase of a lot in a cemetery and the erection of a monument thereon, is proper, when there has been no extravagance n such expenditure, and the rights of creditors and even of legatees are not prejudiced.
7. Legatees who have assented to a sale by the executrix of certain bonds bequeathed to them and who have received the proceeds of sale and receipted therefor, can not thereafter object to the sale.

No. 855. Decided January 3, 1899.

APPEAL from order of Supreme Court of the District of Columbia holding a special term for Orphans' Court business (Probate No 7744), approving and passing a final account settled by an executrix. *Reversed.*

Mr. F. P. B. Sands and *Mr. W. A. Milliken* for the appellants.

Mr. Wm. H. Dennis for the appellee.

Mr. Chief Justice ALVEY delivered the opinion of the Court:

This appeal is taken by the sister, and the children of a deceased sister, as the next of kin of the late Alexander M. Kenaday, deceased, from an order of the court below, approving and passing what would appear to be a final account settled by the executrix of the deceased. And the questions presented on the appeal, as stated in the assignment of errors, have relation to the construction of the last will and testament of the deceased: the power and jurisdiction of the special term of the Supreme Court of this District, sitting to transact Orphans' Court business, to make and enforce distribution of the residue or surplus of the personal estate of the deceased, not specifically or expressly disposed of by his will; and also as to the right of the executrix to be allowed certain sums claimed as credits in her account, against the exceptions of the appellants

The deceased, Alexander M. Kenaday, died in this city of Washington, on March 25, 1897, leaving a last will and testament bearing date the 3d of April, 1894, and by which his widow, Mary Louise Kenaday, was made sole executrix, and which will was duly proved and admitted to probate, and letters testamentary were granted to the executrix named. The deceased left no child or descendant; but he left one sister surviving, and several children of a deceased sister, who predeceased the testator. The surviving sister and some of the children of the deceased sister are the appellants in this appeal, and the widow, the sole executrix, is the appellee.

The case has been in this court on a former appeal (Sinnott vs. Kenaday, 12 App. D. C. 115: 26 Wash. Law Rep. 121); but the specific questions now presented were not then decided by this court. We did, however, say, that the court below would have the power and jurisdiction to grant relief of the nature then prayed, upon a petition filed at the proper time. The petition in that case had been prematurely filed. There had been, at that time, no final or other account, in the nature of a full account, stated by the executrix and approved by the court, showing the true condition of the estate. The final, or what is substantially a full account, has now been stated, and distribution thereon made. The appellants excepted to the account and distribution, but the exceptions were overruled, and the account and distribution were ap-

proved and passed by order of the court of Oct. 11, 1898. It is from that order that this appeal is taken.

By the will of the testator, all his real estate, of considerable quantity and value was devised to his wife, and also a considerable portion of his personal estate. He specifies by general designation a particular class of claims bequeathed to his wife; and he then bequeaths to her his business as a claim agent, and as publisher of "The Vedette," together with all books, papers, files, furniture, etc., etc., also 200 shares of the Sutro Tunnel stock and Comstock bonds; also notes and evidences of indebtedness to him, "of more or less value;" also deposits of currency entered on his bank book of the National Metropolitan Bank amounting to $10,000, more or less.

He then gives to his sister, Mrs. Sinnott, of New Orleans (the sister who survives him), $12,000 in registered U. S. 4 per cent bonds, on special deposit in the National Metropolitan Bank.

Then follow gifts to the children of Mrs. Piles, his deceased sister, "out of the *residue* of 4 per cent. bonds deposited as aforesaid $3,500 as follows:"—naming the legatees, and the amounts given to each, though the several amounts added only make $3,000, and not $3,500—thus leaving of the residue of $3,500 U. S. Bonds on deposit in bank, $500 undisposed of. It is alleged by the appellants that of these amounts thus given to the children of Mrs. Piles, the legacy of $500 given to Eloise Piles, and the legacy of $250 given to Henry C. Piles, have both lapsed by the death of the legatees in the lifetime of the testator.

By another clause of the will there is a promissory note for $1,100.00, secured by a chattel mortgage, made by Mrs. Hemenway, which he directed to be canceled, and that his executrix might allow Mrs. Hemenway $500 in settlement of her account. And then in what appears to be a separate clause of the will he declares that "the bond of the city of Richmond for $5,000 bearing 5 per cent. interest, payable January and July (on special deposit with the 4 per cent. bonds of the United States in the National Metropolitan Bank) is hereby devised and bequeathed to my wife and executrix."

There are some other special provisions in the will, but nothing in addition to what we have recited that is at all material to the questions raised on this appeal *There is no residuary clause in the will.*

It appears by a certificate from the United States Treasury Department, that about a year after the date of the will, that is, on the 1st of April, 1895, the testator acquired and left

standing in his name and to his credit, in the Treasury of the United States, additional $9.000 United States registered 4 per cent. bonds, and thus making the sum total of United States bonds held to his credit at the time of his death amount to $24.500. And in the absence of a residuary clause or bequest in the will, the principal question here is, to whom should these after-acquired bonds, and the $500 of the residue of the $15.500 bonds on special deposit in the bank, and the two lapsed legacies, or such residue thereof after payment of debts, and all other legitimate claims and charges to which they are subject, be distributed?

The will is certainly very unskillfully drawn, but we think there is no great difficulty, by the application of the ordinary principles of construction, in getting at the intention of the testator, and the legal effect of the instrument.

In this final, or what appears to be the full account stated by the the executrix, she charged herself with the amount of the inventory, and with the increased value or increment of the bonds belonging to the estate, the total amount of the inventory being the sum of $36,454 85. Upon this amount she asked and was allowed a commission of ten per cent., making the sum of $3.645.48. This allowance of commission is excepted to by the appellants as being improper, or as excessive, under the facts of the case.

The executrix claimed and was allowed credit for $268.50 paid to the undertaker as funeral expenses; and she also claimed and was allowed as credits in her account the sum of $317 paid for a burial lot in Rock Creek Cemetery and the sum of $575 paid for a monument placed over the grave of the deceased. These two latter sums are excepted to by the appellants as not being legally chargeable to the estate.

In making the distribution of the surplus or residue of the personal estate, after deductions of all claims and allowances and for debts paid, and for all legacies paid over or retained, the executrix took credit in her account, and in discharge of the inventory, for the household furniture, and the City of Richmond bond for $5,000; and she then makes distribution to herself of the balance, or remaining surplus of the estate, in this form: "on account of the bequest to her by the testator of 'notes and evidences of indebtedness to me;' 'deposits of currency entered on my bank book,' and other personal estate, the residue consisting mainly of United States bonds and deposits in bank, $9.218.76." This distribution is excepted to by the appellants, as being without right or warrant in law.

There is also an objection made by the appellants to a sale

made by the executrix of $1,500 of the United States bonds, the proceeds of which sale, it appears, were paid over to the Piles legatees, and for which they gave their receipts to the executrix.

1. We shall first examine the question as to what right and nature of interest was taken by the widow and executrix of the testator, under the will; as upon the determination of that question the other questions raised by the exceptions to the account may, to a certain extent, depend.

There can be no question but that the bequest of the particular claims mentioned and described by the testator as then depending in the courts, were specific legacies, and would have been adeemed if they had been collected in the lifetime of the testator. And so the bequests in the succeeding clause of the will whereby the testator gave to his wife "200 shares of Sutro stock and Comstock bonds; also notes and evidences of indebtedness to me, of more or less value; also deposits of currency entered in my bank book of the National Metropolitan Bank, amounting to $10,000, more or less," are of the same character as the claims bequeathed. It is very clear that this bequest did not embrace United States registered bonds. In all these bequests specific things or matters are referred to as the objects of the bequests; and if they had been disposed of or extinguished by the testator in his lifetime, the legacies would have ceased to exist as such. It has been held in repeated decisions, that a bequest of 100/ consols now standing in my name at the Bank of England (Roper on Leg., ch. 3), or of 100/ consols, *part* of my stock; (Kirby v. Potter, 4 Ves. 750; Hays v. Hays, 1 Keen, 97; Shuttleworth v. Greaves, 4 M. & Cr. 35; are specific bequests. And while a legacy is general when it is so given as not to amount to a bequest of a particular thing yet a legacy is specific when it is a bequest of a specific part of the testator's personal estate, which is and can be distinguished from the rest of his personal estate. Therefore, a bequest of money to be received under a judgment or decree of court, is a specific bequest, and, consequently, not liable to abate with general legacies; and as a result of this principle, if the fund out of which such bequest is payable fails, or should for any cause prove to be insufficient to fulfil the bequest, the legatee must suffer the loss. Chase v. Lockerman, 11 Gill and Johnson, 186. If, therefore, a thing or subject matter be bequeathed in a will by such description as to distinguish it from all other things disposed of by the will, so that it does not remain at the death of the testator as property embraced in any other bequest made by the will, it is a specific legacy,

as distinguished from a general legacy; and the legatee is entitled to the very thing bequeathed if it be possible for the executor to deliver it to him, with all interest or devidends received: but if it can not be delivered, he can have no claim for compensation in money in lieu of the specific thing bequeathed by the will. But, as a distinguishing quality of a specific legacy, and one that gives it preference over other legacies, it must be paid or retained by the executor, while general legacies may be applied to the payment of debts of the estate of the deceased. Specific legacies must be paid or retained by the executor in preference to those which are general, and must not be sold or otherwise applied for the payment of debts or other charges against the estate until the general assets of the testator's estate are exhausted. But while it enjoys this quality of preference or exemption, it is liable to be adeemed by the act of the testator in his lifetime; and this liability to ademption is a fair test of the character of the legacy itself.

According to the principles just stated, all the legacies, including those given to the wife, except the pecuniary legacy of $500, directed to be allowed to Mrs. Hemenway, are specific legacies: and therefore such legacies do not, of course, embrace the after-acquired United States bonds, or lapsed legacies, or any other personal estate or funds of which the testator died possessed: but such estate or funds mak up the residue of the estate, which is subject to be applied to the payment of debts, legacies and charges all kinds, and expenses of administration, to which the estate is liable, to the exoneration of the specific legacies.

But though there is no residuary clause in the will, and the specific legacies do not embrace or exhaust the entire personal estate, the testator did not die intestate as to this residue or surplus, remaining after payment of debts, and any legacy not otherwise provided for, and all the charges and expenses to which the estate was liable. Such surplus or residue devolved on his executrix. And the next question is, what interest did she take in it, if any, other than that of mere executrix for purposes of administration, and how and where is she to account for and distribute this undisposed-of surplus or residue?

It is contended on behalf of the widow and executrix, that this surplus or residue, undisposed of by any express provision of the will, is by law vested in her as executrix: and that the Orphans' Court, or the special term of the Supreme Court exercising the jurisdiction of the Orphans' Court, under the testamentary act of 1798, Ch. 101, has no jurisdiction or

power over the subject of this undisposed-of residue; and if distribution thereof is to be made, it can only be made and enforced by a court of equity, in the exercise of its jurisdiction in respect to implied or constructive tests. But to this contention we cannot for a moment yield our assent.

It is true, according to the English testamentary system, *at law*, it had been the rule from the earliest period, that the whole personal estate devolved on the executor, and if, after payment of the funeral expenses, testamentary charges, debts and legacies, there should be any surplus, it would vest in the executor *beneficially*. In equity, however, while the rule was, *prima facie*, the same as at law, yet, it was held in many cases, that the general rule *at law* should be controlled *in equity*, in all cases where a necessary implication or strong presumption arose that the testator meant to give *only* the office of executor, and not the beneficial interest in the residue. 2 Wms. Executors, 1263, 1264, where the cases are compiled. This rule remained unchanged in England until the year 1830. In all such cases, the executor was considered as a trustee for the next of kin of the testator, the trust to be declared and enforced by a court of equity; the theory being that the English ecclesiastical courts had no jurisdiction over such trusts, or, as said in one of the cases, "but a lame jurisdiction." Pamplin v. Green, 2 Cha. Cas. 95; Matthews v. Newby, 1 Vern. 133, 134. And in stating the origin and growth of the jurisdiction in equity, in ingrafting a trust upon the legal estate devolved upon the executor, Lord Chancellor Hardwicke, in Southcot v. Watson, 3 Atk. 227, 228 (in 1745), said that, "ever since the case of Foster v. Munt, 1 Vern. 473, before Lord Chancellor Jefferies, (in 1687) which underwent various fates, the doctrine established in this court has been that where a man makes a will and an executor, *and gives him a legacy*, he to be considered as a trustee merely for the rest of kin, upon an equity founded on the statute of distribution." This doctrine of a court of equity, in raising a trust in favor of the next of kin, was introduced in order to overcome what was regarded as an unjust and inequitable result of allowing the executor to take the beneficial interest in the residue to the exclusion of the next of kin. In some of the early cases it was held that where the wife of the testator was made executrix, and there was a surplus or residue undisposed of, she would take beneficially, upon consideration alone of being wife. This was so held in the case of Ball v. Smith, 2 Vern. 675; and in the leading case of Farrington v. Knightly, 1 P. Wms. 544, 549, before Lord Chancellor Macclesfield. The chancellor, in stating his first impressions of that case, said: "An

executor, from his name, is but a trustee, he being to execute his testator's will, and therefore called an executor. In the present case, the testator is not to be looked upon as dying intestate, but to have made the executor a trustee of the surplus; and this is the reason why the spiritual courts can not compel a distribution, *because they can not enforce the execution of a trust.* Indeed, in the case of a wife, it has been held that where she is executrix *and has a legacy*, and there is no disposition of the surplus, she shall have it; but I do not hear any precedents cited that go further." This was said by the chancellor in giving his first impressions of the case; but, upon further examination and consideration, he held, and produced several precedents to show, that the wife being the executrix made no difference, and that where she *took a legacy under the will*, she should be decreed to make distribution of the surplus among the next of kin. 1 P. Wms. 550, and the cases cited, and the note to that case by Mr. Cox. And in speaking of the reason of the rule, the chancellor said: "That as to the reason of the case, it was most plain, the making of the person executor ought not amount to a gift of the testator's personal estate; it was no more than making him a trustee, the very word executor importing, *ex vi termini*, that he was only appointed to execute the will, and to have nothing but the management of the personal estate."

The question of the right of executors to appropriate to themselves the undisposed-of surplus or residue of the personal estate of their testators gave rise to much perplexing and expensive litigation, and the state of the law upon the subject became very unsatisfactory, and was frequently the subject of severe animadversion by the equity judges. See cases of Urquhart v. King, 7 Ves. 225, and Pratt v. Sladden, 14 Ves. 193, 197. And to correct what was conceded to be an unjust and unsatisfactory state of the law upon this subject in England, the statute of 11 Geo. 4 and 1 Wm. 4, was passed. By that statute it was declared that any person appointed an executor shall be deemed by the courts of equity to be a trustee for the person or persons (if any) who would be entitled to the estate under the statute of distributions, in *respect of any residue not expressly disposed of*, unless it shall appear by the will or codicil that the person so appointed executor was intended to take such residue beneficially.

The principle that obtained in the English law prior to the passage of the statute just referred to, never had force or recognition in the jurisprudence of Maryland, and consequently, it never had force or recognition as any part of the law of this District. Indeed, we think we are justified in stating that

such principle never formed part of the American law, and hence Mr. Justice Story was well warranted in laying it down as clear that "in America the surplus is by law universally distributable among the next of kin, in the absence of all contrary expressions of intention by the testator." 2 Sto. Eq. Jur. Sec. 1208.

The executor, as is well understood, derives his title as executor from the will of the testator, but he takes no beneficial interest in the undisposed-of surplus or residue of the personal estate, by mere implication or construction, as by the former English Rule. It is true every executor is, in a certain sense and to a certain extent, a trustee for all persons interested in the preservation and distribution of the personal estate of the testator, and he is equally so in respect to the surplus or residue of the estate undisposed of by the will, as of any other portion of the estate. He takes the estate under the will for purposes of administration, and of distribution to those entitled; and while a court of equity has a long established jurisdiction in all matters of trust, of account, of administration, and of construction, in the settlement of estates, yet such jurisdiction is not exclusive of the very ample jurisdiction conferred on the Orphans' Courts of Maryland, and the special term of the Supreme Court of this District for Orphans' Court business, by the testamentary act of 1798, ch. 101. That act embodies in its various provisions a testamentary and administrative system, intended to be complete in itself. It is by no means limited and restricted in the general scope of jurisdiction conferred on the Orphans' Court, to the limited powers and jurisdiction of the spiritual courts of England, as formerly exercised, in respect to testamentary matters. The title of the act plainly indicates its general scope and policy. The title is "An act for amending and reducing into one system, the laws and regulations concerning last wills and testaments, the duties of executors, administrators and guardians, and the rights of orphans and other representatives of deceased persons." In an act so comprehensive as that of 1798, intended to embrace the whole law of administration of decedent's estates, if it had been the intention of the legislature to exclude the jurisdiction of the Orphans' Court in respect to the surplus or residue of the personal estate of the deceased, undisposed of by his will, and to confide that jurisdiction exclusively to a court of equity, and thus, in such case, to divide the administration between two tribunals, we should certainly find some provision in the statute relating to such an exception from the jurisdiction of the Orphans' Court. But nothing of the kind appears in the act. The

only provision to be found in the act that has reference to the right or interest of the executor in the residuary estate of the deceased, is found in Sec. 6, Sub. Chap. 9. By that section, if the executor be a *residuary legatee*, he may be excused from returning to the court an inventory or account, upon giving bond for the payment of all debts and claims against the estate, and for the payment of all legacies given by the will. But it is very plain that this provision contemplates the case of an express residuary bequest to the executor, and not a right to such residue or surplus undisposed of, arising alone by implication or construction of law.

An inference is sought to be drawn, and as showing that the Orphans' Court was not intended to take cognizance and make distribution of such residue or surplus, from the fact that in the Subch. 11, and the sections of that subchapter, providing for the distribution of an intestate's estate, the word "executor" does not appear. But that fact can furnish no material inference in support of the contention of the appellee. There is no lack of provision in the act conferring power and jurisdiction upon the Orphans' Court to make and enforce distribution of the residue of a testator's estate which has not, by any express terms of his will, been disposed of: the power and jurisdiction of that court being ample to superintend and direct full and complete administration of as well the estates of testators as those of intestates. By Sec. 21 of Subch. 15, the Orphans' Court is instituted "for the purpose of taking the probate of wills, granting letters testamentary and of administration: *directing the conduct and settling the accounts of executors* and administrators, securing the rights of legatees, superintending the the distribution of the estates of intestates, securing the rights of orphans and legatees, and *administering justice in all matters relative to the affairs of deceased persons according to law.*" And further, by Sections 6 and 10 of Subch. 10, relating to the duties of executors and administrators, it is, by the first of these sections, provided, that it shall be the duty of an executor, upon the settlement of his account showing that all debts and claims are paid, to deliver up the estate in his hands to those entitled to receive it; and by the next of these sections, it is made the duty of an administrator, upon the settlement of his account, showing the debts and claims all to be paid, to deliver up and distribute the surplus or residue of the estate as therein directed. And by Section 12, of Subch. 15, among other things, it is provided, that "The Orphans' Court shall have full power, authority, and jurisdiction, to examine, hear and decree upon,

all accounts, claims, and demands, existing between wards and their guardians, and between legatees, or persons entitled to any distributable part of an intestate's estate, and executors and administrators, and may enforce obedience to, and execution of, their decrees, in the same ample manner as the court of chancery may."

These provisions of the statute are certainly ample to confer authority and jurisdiction upon the Orphans' Court, or the special term of the Supreme Court exercising the jurisdiction of the Orphans' Court, to direct and enforce the distribution of the undisposed-of residue of the personal estate of the testator, in this case; and we are clearly of opinion, that the executrix, the widow of the deceased, did not take, by any construction of the will, any beneficial right or estate in such undisposed-of residue, as distinguished from her title merely as executrix; and that such undisposed-of residue must be distributed to the next of kin of the testator.

2. The next question is that raised by the exception to the allowance of the commission to the executrix.

It is objected in the first place, that no allowance of commission should have been made, because the specific bequest of the City of Richmond bond, for $5,000, was bequeathed by way of compensation for all trouble and services to be rendered by the executrix in the administration of the estate; and in the second place, if such specific bequest was not intended as such compensation to the executrix, the rate of commission allowed was excessive and unreasonable.

We are of opinion that neither of these objections can prevail. The bequest of the Richmond bond was to "my wife and executrix," without other designation, but nothing to indicate that it was given by way of compensation, and to be taken in lieu of commissions. The descriptive words used to designate the legatee were entirely natural and proper, and were clearly intended as mere *descriptio personæ* of the legatee; and if the wife had failed to obtain letters testamentary, she would, doubtless, have taken the legacy, notwithstanding her failure to become executrix by qualification. This legacy, therefore, can not be treated as compensation in the place and stead of the commission allowed by law. The terms of the bequest will not bear any such construction.

Nor can the objection that the rate of commission is excessive and unreasonable be available to the appellants on this appeal. The statute, by its terms, declares that the commission to be allowed to the executor or administrator shall be, *at the discretion of the court*, not under five per cent. nor exceeding ten per cent. on the amount of the inventory

or inventories, excluding what is lost or hath perished." Act 1798, Ch. 101, Subch. 10, Sec. 2. This provision of the statute, having fixed a minimum and maximum rate of commission to be allowed to executors and administrators, and vested a discretion in the Orphans' Court, restricted only by those limits, an allowance by that court, or court exercising its powers and jurisdiction, within those limits, is conclusive, and therefore not the subject of review in an appellate court. This has been uniformly held by the Court of Appeals of Maryland, in cases where this question on this statute has arisen. Wilson v. Wilson, 3 G. & J. 20; Gwynn v. Dorsey, 4 G. & J. 453; McPherson v. Israel, 5 G. & J. 60; Thomas v. Frederick Co. School, 9 G. & J. 115. The court below was therefore clearly right in overruling the exception to the commission allowed the executrix.

3. Then, as to exceptions to the allowances for the price paid for cemetery lot in Rock Creek Cemetery, at this city, and the price paid for monument placed over the grave of the deceased. The statute provides for the allowance for funeral expenses of the deceased, at the discretion of the court, not to exceed $300. In this case $268.50, were paid the undertaker as funeral expenses. The allowance made of $317 for lot in cemetery, and $575 for monument placed on the lot, are charged and allowed as distinct claims for expenditure incurred for the interment of the deceased. If this were the case where creditors were prejudiced by the allowance of these expenditures, or even legatees whose legacies were lessened by the allowance, the exceptions might receive different consideration.

But this is not such case. The case here is one where the deceased has left a considerable estate, but no children or descendants; and his estate goes to his surviving wife and certain collateral relations. He occupied in life a respectable position in society, and was entitled at his death to such funeral obsequies and respectable interment as accorded with his position and circumstances in life. He was entitled to be buried in the cemetery, and to have his grave marked and distinguished with such monument as is customary with persons of his position and estate. To inter his body in a cemetery, the usual place of interment, it was necessary that a lot should have been purchased, and improved, and distinguished by a suitable monument, to make it conform to its environment, at least to a certain degree. The expenses incurred for these purposes were not strictly funeral expenses; certainly not within the sense and meaning of the provision of the statute, which limits funeral expenses to an amount not to

exceed three hundred dollars. It does not appear that there was any extravagance in the expenditure for these objects, and we can not say that there was error in allowing credits for the amounts claimed in respect to them by the executrix. It would seem to be an ungracious act, on the part of the exceptthe relatives and recipients of the bounty of the deceased, to ants, deny and object to the right of the widow and executrix of the testator, to place over the grave of the latter a lasting memorial structure, at the expense of his own estate, simply because it may lessen to a small extent the amount of distribution that they would otherwise receive. If it were shown that such expenditure was extravagant, and for inappropriate objects, quite another question would be presented; but there is nothing to show any such state of case.

4. And lastly, with respect to the exception to the sale by the executrix of the $1,500 United States bonds, we think there is nothing in the case to support the exception. If the bonds had been of denominations capable of specific delivery, and the legatees had desired such delivery, it would have been the duty of the executrix to have delivered the bonds. But it appears the legatees were content to have the bonds sold and to receive the money therefor, and they did receive the money and receipted to the executrix for it. They can not now be heard to urge an objection to the sale.

It follows from what we have said, that the order of the court below, of the 11th of October, 1898, approving and passing the account of the executrix, must be reversed, and the cause be remanded, that the account be re-stated in accordance with the principles of the foregoing opinion; and it is so ordered.

Order reversed and cause remanded.

No. Book. 66
Brf. of Sands & Milliken for A.
FILED
NOV 29 1899
JAMES H. McKENNEY,
Clerk.
Filed Nov. 29, 1899.

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 305.

MARY LOUISE KENADAY, EXECUTRIX, PLAINTIFF IN ERROR AND APPELLANT,

vs.

ARABELLA D. SINNOTT ET ALS.

MOTION AND BRIEF FOR DEFENDANTS.

F. P. B. SANDS,
WM. A. MILLIKEN,
Solicitors for Defendants in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 11-28-'99

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 305.

MARY LOUISE KENADAY, EXECUTRIX,
PLAINTIFF IN ERROR AND APPELLANT,

vs.

ARABELLA D. SINNOTT ET AL. } *ss:*

Defendants, Arabella D. Sinnott and others, by their solicitors of record, move to dismiss the appeal granted in this cause by Chief Justice Alvey of the Court of Appeals of the District of Columbia, on April 18, 1899, from a decree of said court entered herein on April 5, 1899, upon the ground that the order granting said appeal is void, the cause having been transferred seven (7) days before the granting of said order to this honorable court by writ of error sued out by plaintiff and filed with the clerk of the Court of Appeals on April 11, 1899, and bond for supersedeas under said writ having been filed and approved by Chief Justice Alvey on April 14, 1899, five (5) days before granting said order for appeal.

Defendants, by their solicitors of record, move to dismiss the writ of error in this cause, issued and filed April 11

1899, to the decree of the Court of Appeals entered in this cause on April 5, 1899, upon two grounds:

First. Because a writ of error will not lie to a decree in a proceeding of this character, this not being a judgment at law, but a decree in a proceeding in the nature of an equity proceeding for the settlement of the final account of an executrix in the orphans' court for the District of Columbia.

Second. Because plaintiff in error is not entitled to have this decree of the Court of Appeals reviewed by this honorable court by writ of error or by appeal, this decree being simply a decree confirming a final account of the executrix, as restated by the orphans' court of the District of Columbia under a mandate from the Court of Appeals issued January 20, 1899, upon a *former final decree* rendered by said court on January 3, 1899, on a former appeal in this cause, and from which former decree no appeal was taken by either party to the proceedings.

Defendants, by their solicitors of record, move to affirm this decree of the Court of Appeals of April 5, 1899, under rule 6, paragraph 5, of the rules of the supreme court, on the ground that the writ of error and appeal in this cause were taken for delay only, and ask that under rule 23, paragraph 2, of the rules of the supreme court they be allowed damages at the rate of ten (10) per cent., in addition to interest, upon the decree below.

WM. A. MILLIKEN,
F. P. B. SANDS,
Solicitors for Defendants.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1899.

No. 305.

MARY LOUISE KENADAY, EXECUTRIX, PLAINTIFF IN ERROR AND APPELLANT,

vs.

ARABELLA D. SINNOTT ET ALS.

Brief for Defendants on Motion to Dismiss Appeal and Writ of Error.

STATEMENT OF CASE.

This is a proceeding for the settlement of the final account of an executrix in the supreme court for the District of Columbia, holding a special term for orphans' court business. This record shows that Alexander M. Kenaday died in this District March 25, 1897, leaving a will, which was probated in the orphans' court of the District at the April term, 1897, and the plaintiff in error, Mary Louise Kenaday, was at that term appointed and qualified as executrix, entering into bond in the sum of *forty-five thousand dollars* for the faithful discharge of her duties.

See Record, pages 1 to 5.

On June 10, 1898, under the order of the orphans' court, the executrix gave notice fixing Friday, July 8, 1898, as the day for the settlement of her final account as executrix in the orphans' court and for making distribution of said estate under the orders of said court.

See Record, page 4.

In pursuance of said notice, defendants in error appeared and filed their petition in said court setting up their claim as the next of kin of the decedent, Alexander M. Kenaday, as well as legatees under his will.

See Record, page 5.

The final account of the executrix was made up and filed July 15, 1898, showing that she had received $36,454.85 belonging to the estate, and that she had paid out to legatees under the will and for expenses of administration, including a commission of *ten per cent.* to herself as executrix, the sum of $27,236.09, leaving a balance in her hands which had not been disposed of by the will of $9,218.76. This fund was in United States 4 per cent. registered bonds.

See Record, pages 7, 8.

The executrix claimed this balance of $9,218.76 in United States bonds as being included in a bequest to her by the will, and took credit for same in her account, and thus balanced and closed the account in full.

See Account, bottom of Record, page 8.

Defendants in error claimed this balance of $9,218.76 as next of kin of decedent upon the ground that it had not been included in any bequest in the will, but was a residue of the estate, and therefore necessarily belonged to them as next of kin, there being no residuary clause in the will.

They therefore filed their exceptions to the account, as

stated, by the executrix crediting herself with this item. There were some other minor exceptions to the account not now necessary to refer to. The orphans' court, Justice Hagner, presiding, on October 11, 1898, overruled the exceptions of defendants and approved the final account of the executrix as stated, giving to her this $9,218.76, being the entire balance of said estate. Defendants, on October 13, 1898, appealed from this order approving said final account to the Court of Appeals for the District of Columbia.

See Record, pages 12, 13.

At the January term, 1899, of the Court of Appeals this cause was heard, and the order of Hagner, justice, holding the orphans' court, was reversed with costs. The item of $9,218.76 was decreed to belong to defendants, and the cause was remanded to the orphans' court, with directions that the final account of the executrix be restated in accordance with the principles of the opinion of the Court of Appeals.

See Record, pages 13, 14.

Chief Justice Alvey delivered an able and exhaustive opinion in the case settling and fixing the rights of all the parties, and deciding that the entire balance of the estate, amounting to $9,218.76, as shown by said final account, did not pass under the will to the executrix, but was a residue of the estate not disposed of by the will and belonged to defendants as next of kin.

For some unexplainable reason we find upon examining this record that the plaintiff in error has not made this opinion of the Court of Appeals a part of this record, nor has the clerk of the Court of Appeals sent up a copy of same, as he is specially required to do by the rules of this honorable court. It is reported, however, in 14 Dis. Court of Appeals Rep'ts, page 1, and we respectfully refer to same.

No appeal was taken from that decree of the Court of

Appeals by either party, and in consequence, at the end of twenty (20) days, under the rules of practice of that court, the mandate was issued to the orphans' court to proceed with the execution of the decree of the Court of Appeals.

See Record, pages 13, 14.

In pursuance of this mandate, Justice Bradley, holding the orphans' court, caused said account of the executrix to be restated, as directed by the Court of Appeals, and approved same February 10, 1899.

See Record, pages 17, 18.

Upon the restating of said account the distributive share found to belong to Arabella D. Sinnott, amounting to $4,142.82, was directed by said court to be paid over to her. The balance of said fund was to await proof of death of Henry C. Piles, one of the distributees, before further action.

To this account, as restated, the executrix excepted and raised all the questions which had been heard and determined on the former hearing of the cause, and by a *second appeal* she carried the cause again to the Court of Appeals.

See Record, pages 19, 20.

The cause was for the *second time* heard by the Court of Appeals upon motion of defendants in error to dismiss and affirm, and the court on April 5, 1899, decreed that the final order of the orphans' court of February 10, 1899, approving the restated account, be affirmed, "the said account "appearing to be restated in accordance with the mandate of "this court issued on the former appeal."

See Record, page 25.

On April 11, 1899, the executrix, plaintiff in error, sued out a writ of error to said *second* decree of the Court of Appeals and removed the cause to this honorable court.

See Record, page 26.

On April 14, 1899, the bond for supersedeas on the writ of error was filed and approved by the court.

See Record, pages 29, 30.

The plaintiff in error (as she states in her petition for an appeal) not being properly advised as to whether her writ of error was the proper proceeding, did, on April 17, 1899, apply by an *ex parte* petition to Chief Justice Alvey for an appeal in this cause to this honorable court, and the chief justice did, on April 18, 1899, sign an order allowing an appeal on the ground, as stated in the order, that "it appearing to the court that the practice in cases exactly of "the character of the present one has not been established "by precedent," &c.

See Record, page 28.

Defendants in error have now entered their motion in this court to dismiss the appeal in this cause, and to dismiss the writ of error, and, under rule 6, paragraph 5, of the rules of this honorable court, have joined with their motion to dismiss a motion to affirm the decree of the Court of Appeals on the ground that this writ of error and appeal were taken for delay only, and for ten per cent. damages and interest under rule 23, paragraph 2, of the rules of this honorable court.

Argument.

First. Motion to Dismiss the Appeal.—We move to dismiss the appeal upon the ground that the *ex parte* order of Chief Justice Alvey on April 18, 1899, allowing the appeal, is void, the cause having been removed to this honorable court by the writ of error seven (7) days before, to wit, on April 11, 1899. The Court of Appeals had lost all jurisdiction over the case, and could not make any order therein.

Second. Motion to Dismiss Writ of Error.—We move to dismiss the writ of error on two grounds: *First*, because a writ of error will issue *only* to a judgment at law. This is not a judgment at law, but a decree in equity. The orphans' court, in matters of administration and settling accounts of administrators and executors, is acting as a court of equity, and its proceedings are in the nature of proceedings in equity. A decree of the orphans' court approving an executor's account is not a *judgment* at law, and therefore it cannot be reviewed on a writ of error, but only by an appeal. The plaintiff in error so considered it, and the Court of Appeals so considered it, because the case was carried by *appeal* from the orphans' court to the Court of Appeals. We submit, therefore, that the writ of error will not lie in this case.

The *second* ground of our motion is that the executrix is not entitled to have *this decree* of the Court of Appeals reviewed by this honorable court either by writ of error or appeal or in any other way. She is estopped by the former decree of the Court of Appeals rendered in this cause on January 3, 1899, on the *first appeal*, from which she did not appeal nor seek to have same reviewed or set aside by writ of error or in any way, but she acquiesced in same and allowed the cause to be remanded by the Court of Appeals to the orphans' court, and the decree to be there carried into effect, and the account to be restated in accordance with the directions of the Court of Appeals. She cannot, therefore, be now heard on any questions decided by that former decree. She had her day in court below and in the Court of Appeals, and having lost her case, she cannot again have same tried *de novo* in this court. Every question assigned as an error by her was decided on the former appeal and is *res adjudicata*.

The only thing the Court of Appeals decided on this last appeal is that the account of the executrix had been properly restated by the orphans' court in accordance with the opinion

of the Court of Appeals on the former appeal, and therefore the order approving same is affirmed. A writ of error, if it would lie, or an appeal from this last decree of the Court of Appeals would bring up for review nothing but this decree and the proceedings in the orphans' court subsequent to the former decree.

That former decree was a *complete* and *final* decree, settling and fixing the rights of the parties to this fund in dispute. (See opinion by Chief Justice Alvey, 14 Dis. Court of Appeals Rpts., page 1.) Under that decree and the mandate of the Court of Appeals, the orphans' court had no discretion in the restating of the account. It could exercise no *judicial* power in the case. It simply performed a mere clerical or ministerial duty by restating the account as the Court of Appeals directed. It simply carried into effect the decree of the Court of Appeals.

The authorities all agree that where a superior court renders a decree fixing the liability and rights of parties and remands the case to a subordinate court for a *judicial* purpose, upon which a further decree is to be entered, it is not a *final decree.*

Cal. Nat. Bank *vs.* Stateler, 171 U. S., 447.

But where the case is remanded to the lower court for a *ministerial purpose only*, in order to carry out the decree of the superior court, such a decree is *final* and *conclusive* of the case.

McGourkey *vs.* T. & O. R. R.; 146 U. S., 537.
Mower *vs.* Fletcher, 114 U. S., 127.

The whole question, whether a decree is final or not, hinges on the point whether the reference to a master or the mandate to the court below is for a *judicial purpose* or a

mere *ministerial purpose.* All the cases recognize this distinction. We cite a number of them.

Whiting *vs.* Bank, 13 Pet., 6.
Winthrop Iron Co. *vs.* Meeker, 109 U. S., 180.
Ex parte Norton, 108 U. S., 237.
Blossom *vs.* Railroad, 1 Wall., 65.
Railroad *vs.* Bradley, 7 Wall., 577.
Thompson *vs.* Dean, 7 Wall., 342.
French *vs.* Shoemaker, 12 Wall., 86.

We respectfully refer also to—
93 U. S., 108.
18 Wall., 628.
19 Wall., 283.
23 Wall., 405–420.

Nothing can be clearer than that former opinion and decree of the Court of Appeals. An examination of it shows every question now sought to be raised by plaintiff in her assignment of errors was raised on that trial and decided by that opinion. The account that had been approved by Hagner, justice, was a final account and complete settlement of the estate by the executrix. Had Justice Hagner's opinion been sustained by the Court of Appeals, that would have ended the litigation and closed the settlement of the estate, unless defendants had appealed to this honorable court. If it was a final account and settlement as to us, it must of necessity be the same as to the plaintiff in error.

The authorities are numerous and unanimous to the effect that on a *second appeal* all questions settled on a former appeal are *res adjudicata.*

Second appeals or writs of error will lie in certain cases where it is alleged that the mandate of the appellate court *has not been* properly executed; but the appeal or writ of error in such case will bring up nothing for re-examination *except the proceedings subsequent to the mandate.* Needful ex-

planations may be derived from the original record, but the re-examination cannot extend to anything that was decided on the antecedent appeal or writ of error.

The Lady Pike, 96 U. S., 461.
Supervisors *vs.* Kennicott, 94 U. S., 498.
Huckley *vs.* Morton, 103 U. S., 764.
Ames *vs.* Quinby, 106 U. S., 384.
Clark *vs.* Keith, 106 U. S., 464.

Indeed the circuit courts of appeals have held in numerous cases that an appeal should not be entertained from a decree of a circuit court rendered pursuant to a mandate of the court of appeals *when no errors are assigned as to matters arising subsequent to the mandate.*

Gregory *vs.* Pike, 77 Fed. Rpt., 241.
Gregory *vs.* Pike, 23 C. C. A., 138.
In re Pike, 76 Fed. Rpt., 400.
In re Pike, 22 C. C. A., 244.

This honorable court has also laid down the principle that no appeal or writ of error will be allowed from a decree entered by a lower court in accordance with a mandate of a superior court.

See Humphreys *vs.* Baker, 103 U. S., 736.
Stewart *vs.* Salamon, 97 U. S., 361.

In above-cited case of Humphreys *vs.* Baker, Chief Justice Waite says:

"We have decided that we would not entertain an appeal from a decree entered in exact accordance with our mandate on a former appeal, and that when such an appeal was taken, we would, on application, examine the decree and if it conformed to the mandate, dismiss the case with costs."

Relying upon these authorities, we have made this motion to dismiss this writ of error. We have under rule

6, paragraph 5, of the rules of this honorable court joined with this motion to dismiss a motion to affirm, on the ground that this writ of error and appeal were taken for *delay only*. The manifest purpose to delay this cause in every way possible is shown by this record. The *flimsy pretext* under which the executrix has set up claim to the fund in her hands belonging to defendants shows the force of our charge that the whole spirit of this litigation has been to prevent defendants from receiving their money to the very last moment possible and delay justice. The Court of Appeals, in rendering the opinion on the former trial of this case, used the expression that the position under which the executrix sought to withhold this fund from defendants "was not the law and never was the law in America."

The further fact that when the Court of Appeals rendered its opinion January 3, 1899, plaintiff in error did not except to same or seek to have same reviewed then, either by appeal or writ of error, but allowed same to be remanded to the orphans' court, and then from there began a series of appeals and writs of error from that court to the Court of Appeals, and from the Court of Appeals to this court, and by this means has delayed the just settlement of this estate nearly three years since her qualification—all these facts go to show the manifest purpose of plaintiff in error has been *delay*. This record shows the testator died March 25, 1897, leaving a personal estate of $36,000. He left no debts except those of his last illness, amounting only to $457.10. There were no complications in his estate, it being entirely in cash in bank, in United States registered bonds and a City of Richmond bond. It could easily and safely have been settled in thirty days after giving the formal notice for creditors, because there were no creditors, as the executrix well knew, as this record shows. But the executrix delayed the full fifteen months before making her *final settlement*, and in that settlement she set up her claim to the entire balance of the estate, and from that day to this has

litigated these defendants in every way possible on a claim held by the Court of Appeals to be without foundation. We therefore feel that this case comes clearly within the rule laid down by this honorable court on page 21 of Rules of the Supreme Court, rule 23, paragraph 2:

"In all cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay, damages at a rate not exceeding 10 per cent. in addition to interest shall be awarded upon the amount of the judgment."

It is, therefore, respectfully asked that the decree of the Court of Appeals be affirmed and we be allowed the 10 per cent. damages and interest under this rule.

Respectfully submitted.

F. P. B. Sands,

Wm. A. Milliken,

Solicitors for Defendants in Error.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1900.

No. 66.

MARY LOUISE KENADAY, EXECUTRIX, PLAINTIFF IN ERROR AND APPELLANT,

vs.

ARABELLA D. SINNOTT ET ALS.

BRIEF FOR APPELLEES ON THE ASSIGNMENT OF ERRORS BY PLAINTIFF IN ERROR.

STATEMENT OF CASE.

The statement of this case, made in the brief filed herein by appellees, on their motion to dismiss the writ of error and appeal, is deemed sufficient without consuming the time of this honorable court by a restatement here.

Before taking up the errors assigned by plaintiff in error we respectfully call the attention of this honorable court to the objection filed by the appellee Arabella D. Sinnott on record page 24 to any paper being copied into this record in

the orphans' court filed prior to January 20, 1899. The date of the mandate from the Court of Appeals was filed in the orphans' court reversing and remanding this cause. But notwithstanding this objection, all the papers in the case from the probate of the will and appointment and qualification of the executor were copied into the record, thus bringing before the Court of Appeals for a second trial the same record that it had heard and decided on the former appeal at the January term, 1899.

This was done, of course, to get before the Court of Appeals the former record, in order to bring it to this court on appeal or writ of error, and in this way secure an opinion from this court on the case tried by the Court of Appeals at its January term, 1899, and from which the executrix had not appealed nor sought to reverse by writ of error.

It is therefore now respectfully submitted that this honorable court is not called upon in this case to go behind the mandate of the Court of Appeals filed in the orphans' court January 20, 1899, and to examine and review the action of the Court of Appeals on that former appeal.

In case, however, this honorable court shall deem it proper to examine this entire record and pass upon all the questions raised and sought to be raised by this executrix, we respectfully submit the following brief upon the several errors assigned herein by the plaintiff in error:

First. It is assigned as error that the orphans' court for the District of Columbia has no jurisdiction to order distribution by an executrix of a residue found in the settlement of her final account to be in her hands, nor has it jurisdiction in passing upon said final account to examine and construe the will of the testator to see to whom that residue belongs.

The Court of Appeals held the orphans' court did have this power and jurisdiction.

The opinion of the Court of Appeals, which is full and clear (but which the plaintiff has not made a part of this

record), shows beyond question that the orphans' court has full, ample, and complete power and jurisdiction to do these very things.

The orphans' court of the District of Columbia derives its powers and jurisdiction from the testamentary act of Maryland of 1798, chapter 101.

This act embodies in its various provisions a testamentary and administrative system intended to be complete in itself. The title is "An act for amending and reducing into one system the laws and regulations concerning last wills and testaments, the duties of executors, administrators, and guardians, and the rights of orphans and other representatives of deceased persons."

The Court of Appeals in its opinion says:

"In an act so comprehensive as that of 1798, intended to embrace the whole law of administration of decedent's estates, if it had been the intention of the legislature to exclude the jurisdiction of the orphans' court in respect to the surplus or residue of the personal estate of the deceased, undisposed of by his will, and to confide that jurisdiction exclusively to a court of equity, and thus, in such case, to divide the administration between the two tribunals, we should certainly find some provision in the statute relating to such an exception from the jurisdiction of the orphans' court. But nothing of the kind appears in the act. * * *

"There is no lack of provision in the act conferring power and jurisdiction upon the orphans' court to make and enforce distribution of the residue of a testator's estate which has not, by any express terms of his will, been disposed of: the power and jurisdiction of that court being ample to superintend and direct full and complete administration of as well the estates of testators as those of intestates.

"By sec. 21 of subch. 15, the orphans' court is instituted 'for the purpose of taking the probate of wills, granting letters testamentary and of administration; *directing the conduct and settling the accounts of executors* and administrators, securing the rights of legatees, superintending the distribution of the estates of intestates, securing the rights of orphans and legatees, and *administering justice in all matters relative to the affairs of deceased persons, according to law.*' By

sections 6 and 10 of subch. 10, relating to the duties of executors and administrators, it is, by the first of these sections, provided, that 'it shall be the duty of an executor, upon the settlement of his account showing that all debts and claims are paid, to deliver up the estate in his hands to those entitled to receive it.'

By section 12 of subch. 15 among other things it is provided that—

"The orphans' court shall have full power, authority, and jurisdiction, to examine, hear, and decree upon, all accounts, claims, and demands, existing between wards and their guardians, and between legatees, or persons entitled to any distributable part of an intestate's estate, and executors and administrators, and may enforce obedience to, and execution of, their decrees, in the same ample manner as the court of chancery may."

"These provisions of the statute," says the Court of Appeals, "are certainly ample to confer authority and jurisdiction upon the orphans' court, or the special term of the supreme court exercising the jurisdiction of the orphans' court, to direct and enforce the distribution of the undisposed-of residue of the personal estate of the testator, in this case; and we are clearly of opinion, that the executrix, the widow of the deceased, did not take, by any construction of the will, any beneficial right or estate in such undisposed-of residue, as distinguished from her title merely as executrix; and that such undisposed-of residue must be distributed to the next of kin of the testator."

For opinion in full of the Court of Appeals in this case, see 14 Dist. Court of Appeals Repts., p. 1.

In the face of these plain provisions of this statute, it is difficult to treat this assignment of error as seriously made by this executrix; but when we go a step farther and consider that these proceedings were instituted in the orphans' court by this executrix herself and not by these appellees, then we feel justified in insisting before this honorable court that these assignments of error and this writ of error and this appeal are all frivolous and intended only to delay the pay-

ment to these appellees of this residue in the hands of this appellant. On record page 4 will be found an order obtained from the orphans' court on June 10, 1898, on the *ex parte* application of this executrix, fixing Friday, July 8, 1898, at 10 o'clock a. m., as the time and that court as the place for a meeting of creditors or persons entitled to distributive shares or legacies or a residue and directing that a notice be published once a week for three weeks in the "Washington Law Reporter," notifying such persons to attend in person or by attorney or agent duly authorized, &c. Thus was these proceedings begun and this litigation started by this executrix in the orphans' court.

This notice recites that that time and place was appointed "for making payment and distribution under the court's direction and control," &c. It was in pursuance of this order and notice that these appellees came into the orphans' court on the 8th day of July, 1898, and filed their petition setting forth their claims as the next of kin and distributees of the testator, Alexander M. Kenaday, deceased, as well as legatees under his will.

See Record, p. 5.

Thereupon this executrix filed with said court her final account in full settlement of the personal estate and submitted same to said court for its examination, and asked that same be passed and approved.

In this final account she showed there was a balance consisting of United States 4 per cent. registered bonds amounting to $9,218.76, which she had, as she stated, *distributed to herself*, claiming that it belonged to her under a clause in the second *item* of the will.

See Record, pp. 7 and 8.

These appellants, who are the next of kin of the decedent and legatees under his will, naturally objected to such summary appropriation of these bonds and excepted to this ac-

count and asked the orphans' court not to pass and approve the same, but that court did pass and approve it, and they thereupon appealed from such approval to the Court of Appeals of the District of Columbia, and there this executrix made the argument that the orphans' court had no power or jurisdiction in the matter. This assignment of error puts the executrix, therefore, in the position of saying—

"It is true that I instituted these proceedings in the or-
"phans' court and had these appellees brought there, and I
"submitted my account to said court for its *approval*. That
"court had the power to *approve* my account, but it has not
"the power to *disapprove it*."

We submit that there is no error in the ruling of the Court of Appeals on this point, and that this executrix has brought this cause here upon a most frivolous assignment of error.

The second point assigned as an error is that the Court of Appeals is wrong in deciding that the residue of this personal estate, consisting of United States 4 per cent. registered bonds amounting to $9,218.76, did not go to appellant, but passed to these appellees as the next of kin of the decedent.

Appellant, in her final account, on record page 8, states that she has retained this balance of $9,218.76 as her own, as a "bequest to her by the testator" of "notes and evidences of indebtedness to me," "deposits of currency entered on my bank book," &c. On record page 12, *fourth* paragraph, she says:

"The executrix has distributed to herself, what remains of the personal estate, after paying the legacies to other persons, because it comes under the designations of 'evidences of indebtedness,' 'deposits of currency,' &c., which are bequeathed to her. She is advised that in any case she would be entitled to retain the same as executrix, until the next of kin obtained a decree in equity making her trustee for them, upon a construction of the will."

Here, then, we have the whole contention of appellant: First, that this residue of $9,218.76 was bequeathed to her

under those expressions in the will. But if she is mistaken in that she can nevertheless hold this residue until a court of equity declares her a trustee for these distributees.

This record, page 2, shows that the will in this case was executed April 3, 1894.

The certificate of the Register of the United States Treasury, on record page 11, shows that on April 23, 1889, there were standing in the name of Alexander M. Kenaday (this testator) four registered bonds of the United States (known as 4 per cent. consols of 1907), as follows:

Bond No. 71519, for	$500.00
" " 37400, "	5,000.00
" " 37401, "	5,000.00
" " 37402, "	5,000.00
Making a total of.....	$15,500.00

And on April 1, 1895, one year after the execution of his will, there were registered in his name five other United States 4 per cent. bonds, as follows:

Bond No. 44,695, for	$5,000.00
" " 183,336, "	1,000.00
" " 183,337, "	1,000.00
" " 183,338, "	1,000.00
" " 183,339, "	1,000.00
Making a total of.....	$9,000.00

These bonds were acquired one year after the date of execution of his will by Mr. Kenaday, and these are the bonds which constitute the residue of the estate and are claimed by the executrix to have been intended to be given to her by the clause in the second item of the will, "notes and evidences of indebtedness to me, of more or less value," &c. Not only does this fact that he did not own these bonds at

the time he executed this will refute any such idea or construction, but the very next item in the will itself refutes it.

In *items* one and two the testator gives to the wife (the executrix and appellant herein) his real estate and certain claims in the courts in relation to said real estate, and, after enumerating these claims, he adds:

"Also 200 shares of Sutro Tunnel stock and Comstock bonds; also notes and evidences of indebtedness to me, of more or less value; also deposits of currency entered on my bank book of the National Metropolitan bank amounting to $10,000.00 more or less."

Then in the *very next item* he says:

"*Item.*—I give devise and bequeath to my beloved sister Arabella D. Sinnott, residing in New Orleans La., twelve thousand dollars in registered U. S. 4 % bonds, on special deposit in the National Metropolitan bank.

"*Item.*—I give devise and bequeath to the surviving children of my deceased sister, Martha J. Piles, out of the residue of 4 % bonds, deposited as aforesaid ($3,500.00) as follows: To Mrs. Belle Hubert $500.00, to Wm. A. Piles $500.00, to Ida Piles $500.00, to Eloise Piles $500.00, to Edith K. Piles $750.00, to Henry C. Piles $250.00."

These two *items*, following immediately after the *item* containing the clause "also notes and evidences of indebtedness to me of more or less value," show conclusively that the testator had no allusion whatever to his United States bonds by that clause. The legacy to his sister Arabella D. Sinnott of $12,000 United States 4 per cent. registered bonds and the $3,500 United States 4 per cent. registered bonds to the children of his deceased sister Martha J. Piles disposed of all the United States registered bonds he had at that time. This residue of $9,218.76 is the five United States 4 per cent. bonds acquired by the testator one year after he executed this will, to wit, April 3, 1895.

The next position appellant assumes is that even if these

bonds do not belong to her she can nevertheless retain them until we obtain a decree in a court of equity declaring her a trustee for our benefit as to same. This position is fully met under the question as to the jurisdiction and power of the orphans' court. The statutes there cited show conclusively that the orphans' court can compel her to distribute these bonds to the next of kin without any resort to a court of equity.

The next error assigned is that the Court of Appeals is in error in holding that the widow is not entitled to at least one-half of this $9,218.76 residue not bequeathed by the will.

A sufficient answer to this is that the Court of Appeals did not so hold and did not pass on the question for the reason that no such point was raised when the case was tried before the Court of Appeals on its merits. This was an *afterthought* of the appellant, and evidently thrown in as a makeshift to try and give some appearance of cause for her writ of error.

But had the Court of Appeals so held it would have been right. The statute settles this claim against this widow, and it is necessary only to cite it. The act of Maryland, above cited, of 1798, chap. 101, subchap. 13, sec. 1, declares:

> "Every devise of land or any estate therein, or bequest of personal estate, to the wife of the testator, shall be construed to be intended in bar of her dower in lands, or share of the personal estate respectively unless otherwise expressed in the will."
>
> See Compiled Statutes of the Dist. of Columbia, p. 35, sec. 157.

This act also provides how the widow may renounce in writing a bequest or legacy within 90 days from the probate of will and by so doing be reinstated to her dower rights and right to share in the personal estate.

The will shows in this case a very handsome bequest of three valuable houses and lots in the city of Washington,

which was all the realty he owned and a most handsome provision in the way of legacies.

Not having renounced these bequests and legacies, she is, of course, under the statute, barred from any claim to a share in this residue of United States bonds, not disposed of by the will of the testator.

We respectfully submit that the learned counsel for the executrix must have known of this statute, and that this executrix could not claim any share of this residue as widow, and we again submit to this honorable court that this assignment of error also is frivolous and bears out the position we respectfully urge before this honorable court, that this entire litigation, this writ of error, and appeal have been for delay only. We therefore respectfully submit that the decree below should be affirmed and damages, at the rate of 10 per cent., in addition to interest, be awarded appellees.

F. P. B. Sands,
Wm. A. Milliken,
Solicitors for Appellees.

Supreme Court of the United States.

No. 66.—October Term, 1900.

Mary Louise Kenaday, Executrix, Plaintiff in Error and Appellant,
vs.
Arabella D. Sinnott, William A. Piles, Ida Piles Miller and Belle Hubert.

In error to and appeal from the Court of Appeals of the District of Columbia.

[December 24, 1900.]

This was a proceeding for the settlement of the final account of Mary Louise Kenaday, as executrix of Alexander M. Kenaday, in the Supreme Court of the District of Columbia, holding a special term for orphans' court business. Alexander M. Kenaday died in the District of Columbia, March 25, 1897, leaving a will, which was probated in the orphans' court of the District at the April term, 1897, and was as follows:

"In the name of God, Amen. I, Alexander McConnell Kenaday, resident of Washington, District of Columbia, being of sound and disposing mind and memory, calling to mind the frailty and uncertainty of human life, and being desirous of settling my worldly affairs and directing how the estates which it has pleased God to bless me shall be disposed of—after my decease—while I have strength and capacity so to do, do make and publish this last will and testament, hereby revoking and making null and void all other last wills and testaments by me heretofore made. And first, I commend my mortal being to Him who gave it, and my body to the earth, to be buried with [as*] as little expense by my executor hereinafter named.

"*Imprimis.* My will is that all my just debts and funeral charges shall be paid out of my estate, by my executrix.

"*Item.* I give, devise and bequeath to my beloved wife, Mary Louise Kenaday, all my real estate, household furniture, and claims pending in the courts in relation to said real estate, to wit:

"House and lot known as No. 507 & 509 on F street, northwest, Washington, D. C. lot No 2 (east half) of square 482, 30 x 101.10.

"House and lot known as No. 621 H street, northwest, lot No. 4 sq. No. 483, 20 3/4 x 133 to an alley.

"House and lot known as No. 2006 G street, northwest, lot No. 25 in square No. 103, 20 1/2 x 120 ft. to an alley.

"And I hereby authorize my wife, as executrix, to convey by deeds in fee simple any or all of said real estate in accordance with the laws of the District of Columbia, under the advice of some competent attorney.

"*Item.* Included as claims pending in the courts are: An account for taxes against the estate of De Vaughn *v.* De Vaughn, unjustly withheld,

* [Word enclosed in brackets erased in copy.]

in charge of my attorney Woodbury Wheeler, Esq. Also, an account for moneys withheld by the trustees of Edwards *v.* Maupin. In charge of my attorney, Frank W. Hackett, Esq., amounting to $1,078 with interest at six per cent. per annum from March 7, 1888.

"Also, my business as a claim agent and as publisher of 'The Vedette,' together with all books, papers, files, office furniture, &c., &c. Also, 200 shares of Sutro Tunnel stock and Comstock bonds; also, notes and evidences of indebtedness to me, of more or less value; also, deposits of currency entered on my bank book of the National Metropolitan Bank, amounting to $10,000.00 more or less.

"*Item.* I give, devise and bequeath to my beloved sister Arabella D. Sinnott, residing in New Orleans, La., twelve thousand dollars in registered U. S. 4 % bonds, on special deposit in the National Metropolitan Bank.

"*Item.* I give, devise and bequeath to the surviving children of my deceased sister, Martha J. Piles, out of the residue of 4 % bonds deposited as aforesaid ($3,500.00) as follows: To Mrs. Belle Hubert, $500.00. To Wm. A. Piles, $500.00. To Ida Piles, $500.00. To Eloise Piles, $500.00. To Edith K. Piles, $750.00. To Henry C. Piles, $250.00.

"*Item.* The promissory note for $1,100.00 filed with a chattel mortgage in my name in the office of the recorder of deeds, in the District of Columbia, signed by Mrs. Anna Hemenway, shall be cancelled and my executrix may allow Mrs. Hemenway $500 in settlement of her account.

"The bond of the city of Richmond, for $5000.00 bearing 5 per cent. interest, payable January and July—(on special deposit with the 4% bonds of the U. S. in the National Metropolitan Bank,) is hereby devised and bequeathed to my wife and executrix.

"The sum of $5,000.00 advanced to Wm. C. McGeorge of San Francisco, California, no account of which has been rendered by him, is hereby devoted to the relatives of my wife, and used according to her discretion."

The will was subscribed by the testator, April 3, 1894, in the presence of three witnesses, whose attestation was sworn to.

Mrs. Kenaday duly qualified as executrix, and proceeded in the discharge of her duties. On June 10, 1898, under the order of the orphans' court, the executrix gave notice, appointing Friday, July 8, 1898, as the day for the settlement of her final account as executrix by that court; and for making distribution of the estate under its orders.

Arabella D. Sinnot, William A. Piles, Ida Piles Miller and Belle Hubert appeared and filed their petition, claiming as distributees as the only surviving next of kin and heirs at law of the decedent. They admitted the receipt from the testatrix of their respective legacies under the will, and that another legatee therein named, Edith K. Piles, since dead, had also received her legacy; and said: "The other two legatees, to wit, Henry C. Piles, and Eloise Piles, have not been paid the amounts left them, the said Eloise having died before the testator, Alexander M. Kenaday, and the said Henry C. not having been heard from during the last six years and who your petitioners believe is dead."

The final account of the executrix was made up and filed July 15, 1898, showing that she charged herself with a $5,000 bond of Richmond, Va.; $24,500 United States registered bonds; 200 shares stock Comstock Tunnel Company and one certificate of scrip of that company, appraised as valueless; cash found on deposit in National Metropolitan Bank, $810.60; and some items of interest, &c.; that the Hemenway note had not been found; that she credited herself with disbursements for costs, funeral expenses, &c.; with commissions; and with legacies paid or otherwise satisfied, but not including therein the $810.60 on deposit; and that there was in her hands $9,218.76, "consisting mainly of United States bonds and deposits in bank," which the executrix credited herself with "on account of the bequest to her by the testator of 'notes and evidences of indebtedness to me,' 'deposits of currency entered on my bank book,' and other personal estate," and thus balanced and closed the account in full.

The intervening next of kin claimed the balance on the ground that it was residuary estate, and that, there being no residuary clause in the will, it necessarily belonged to them; and filed their exceptions to the account as stated, particularly excepting to the credit of the $9,218.76.

A certificate of the Register of the Treasury was filed, to the effect that the records of his office showed that registered four per cent. bonds of the United States were standing in the name of Alexander M. Kenaday on the first day of April, 1897, to the amount of $24,500; of which, bonds to the amount of $15,500 bore date April 23, 1889, and bonds to the amount of $9,000 bore date April 1, 1895.

The orphans' court, Hagner, J., presiding, on October 11, 1898, overruled the exceptions, and approved the final account of the executrix as stated. All said next of kin thereupon appealed from this order to the Court of Appeals for the District of Columbia.

At the January term, 1899, the cause was heard, the order was reversed with costs, and the cause was remanded to the court below with a direction "that the account be restated in accordance with the principles of the opinion of this court." 14 App. D. C. 1. The mandate having gone down, the account of the executrix was restated as directed by the Court of Appeals, and approved February 10, 1899.

The balance for distribution according to that account was stated to be $8,285.64, and the distributive shares as folllows:

"To Arabella D. Sinnott, sister, ½	$4,142 82
" Mrs. Belle Piles Hubert, niece, ⅙ of ½	828 56
" Edith K. Piles, " " " "	828 56
" Ida Piles Miller, " " " "	828 56
" William A. Piles, nephew, " " " "	828 56
" Henry C. Piles, " " " "	828 56
Fractions	02
	$8,285 64"

On the same tenth of February, Mrs. Kenaday was ordered to pay over and deliver to the said Arabella B. Sinnott, through her attorneys of record, the sum of $4,142.82, being her distributive share of said estate, taking receipt for the same. Thereupon Mrs. Kenady appealed in open court to the Court of Appeals from the order of February 10, approving and passing the account, and from the order directing the distribution to Arabella B. Sinnott of the amount therein mentioned as her share. An appeal bond in the sum of $8,000 running to Arabella B. Sinnott, to operate as a supersedeas to the order directing the payment to her of $4,142.82 was required by order of court, and it was also directed that the penalty of a bond for costs in the matter of the appeal from the order approving the account, filed the same day, be fixed at $50, or in lieu of such bond for costs, a deposit of that amount in cash. A supersedeas bond in the penalty of $8,000 was approved, filed and recorded, and $50 was deposited in lieu of bond on appeal from the order approving the account. The Court of Appeals filed an opinion, *per curiam*, that on examining the transcripts of record it was found that the court below had in the restatement of the account followed and observed the mandate sent down on the former appeal, and that it was ordered that the motion made by the said Arabella D. Sinnott to dismiss or affirm the order of the court below approving and passing said final account of the estate, under rule sixteen of the court, be denied, but that the said final order of said court approving and passing said account, the same bearing date the tenth day of February, 1899, on the appeal of the said Mary L. Kenaday, executrix, be affirmed, "the said account appearing to be stated in accordance with the mandate of this court issued on the former appeal." Thereupon judgment was entered April 5, 1899, "that the order of the said Supreme Court in this cause, of February 10, 1899, approving and passing account be, and the same is hereby, affirmed with costs." A writ of error to remove the cause to this court was thereupon allowed by that court, and issued, a supersedeas bond being given and approved. Subsequently the executrix, being in doubt whether the proceedings to obtain a review should be by writ of error, or appeal, prayed an appeal, which was granted in these words: "On motion of Mary L. Kenaday, executrix, by her attorney, and it appearing to the court that the practice in cases exactly of the character of the present one has not been established by precedent, it is adjudged and ordered by the court this 17th day of April, 1899, that said executrix be, and she is hereby, allowed an appeal from the order of this court passed herein April 5, 1899, and that the same bond in the sum of ten thousand dollars, to act as a supersedeas upon the issuing a writ of error in this case, shall stand and act as a supersedeas upon said appeal, or according as a writ of error or appeal is ultimately decided to be the method of obtaining a review of the decision of this court in said cause."

The supersedeas bond was in the sum of $10,000, and ran to Arabella D. Sinnott, William A. Piles, Ida Piles Miller and Belle Hubert.

Mr. Chief Justice FULLER delivered the opinion of the Court:

The Court of Appeals allowed a writ of error to review its decree approving the final account, and, a few days subsequently, and at the same term, in view of the fact that the practice in cases of this precise character had not been established, also allowed an appeal, the supersedeas bond on the writ to stand on the appeal, if appeal were determined to be the correct method of procedure. The cause was docketed in this court as on writ of error, and as on appeal, and appellees or defendants in error move to dismiss the appeal because the writ of error had previously issued, and the writ of error because the remedy was by appeal. We must decline, however, to sustain both motions on these grounds under the circumstances. The determination of the proper course to be taken in seeking our jurisdiction will dispose of one motion or the other.

By section 8 of the act of February 9, 1893, 27 Stat. 434, c. 74, final judgments or decrees of the Court of Appeals are to be re-examined by this court on writ of error or appeal in the same manner and under the same regulations as theretofore provided in cases of writs of error or appeals from judgments in the Supreme Court of the District of Columbia.

In *Ormsby* v. *Webb*, 134 U. S. 47, it was ruled that a writ of error would lie to review a judgment of the Supreme Court of the District of Columbia, admitting a will to probate, not merely because in that case a trial by jury had been actually had, but upon the more general grounds, thus stated by Mr. Justice Harlan: "It is, of course, undisputed that a final decree in equity, in the court below, cannot be reviewed here by means of a writ of error. But a proceeding involving the original probate of a last will and testament is not strictly a proceeding in equity, although rights arising out of, or dependent upon, such probate have often been determined by suits in equity. In determining the question of the competency of the deceased to make a will, the parties have an absolute right to a trial by jury, and to bills of exceptions covering all the rulings of the court during the progress of such trial. These are not the ordinary features of a suit in equity. A proceeding in this District for the probate of a will, although of a peculiar character, is nevertheless a case in which there may be adversary parties, and in which there may be a final judgment affecting rights of property. It comes within the very terms of the act of Congress defining the cases in the Supreme Court of this District, the final judgments in which may be re-examined here. If it be not a case in equity, it is to be brought to this court upon writ of error, although the proceeding may not be technically one at law, as distinguished from equity." And see *Campbell* v. *Porter*, 162 U. S. 478.

But while that is the established rule in that class of cases, it by no means follows that it is applicable in this case.

At common law jurisdiction over the estates of deceased persons vested in the ecclesiastical, common law and chancery courts, and, in this country, courts of probate or orphans' courts have universally been created by statute for the general exercise of that jurisdiction, including the exercise of equitable, as well as common law powers, and the pursuit of appropriate procedure.

The District Supreme Court sits as an orphans' court, and by section 1 of Subch. 15 of chap. 101 of the Maryland testamentary act of January 20, 1799, (2 Kilty, November Session, 1798,) the orphans' court was instituted "for the purpose of taking the probate of wills, granting letters testamentary and of administration, directing the conduct and settling the accounts of executors and administrators, securing the rights of legatees, superintending the distribution of the estates of intestates, securing the rights of orphans and legatees, and administering justice in all matters relative to the affairs of deceased persons, according to law."

By other sections it is made the duty of the executor or the administrator, on settlement of his account, to deliver up the estate, or deliver up and distribute the surplus or residue.

And by section 12, of Subch. 15, it is provided that: "The orphans' court shall have full power, authority and jurisdiction to examine, hear and decree upon, all accounts, claims and demands, existing between wards and their guardians, and between legatees, or persons entitled to any distributable part of an intestate's estate, and executors and administrators, and may enforce obedience to, and execution of, their decrees, in the same ample manner as the court of chancery may."

There can be no question that the District Supreme Court was clothed, as an orphans' court, with ample powers to proceed in the settlement of estates and the distribution thereof to those entitled, in accordance with equitable principles and procedure; and we think that the controversy raised by the exceptions of the next of kin to this final account was in its nature of equitable cognizance, and that the decree of the Court of Appeals is properly reviewable on appeal rather than on writ of error.

The reasoning which conducts to this conclusion in proceedings of this character in effect disposes of the contention of appellant that the decree should be reversed because the orphans' court had no jurisdiction over an alleged residue of personalty in the hands of an executrix undisposed of by the will, as jurisdiction over it belonged solely to a court of equity, as a matter of trust. Alvey, C. J., in the opinion reported 14 App. D. C. 1, 21, discussed the subject at length, and, among other things, said: "The executor, as is well understood, derives his title as executor from the will

of the testator, but he takes no beneficial interest in the undisposed of surplus or residue of the personal estate, by mere implication or construction, as by the former English rule. It is true every executor is, in a certain sense and to a certain extent, a trustee for all persons interested in the preservation and distribution of the personal estate of the testator, and he is equally so in respect of the surplus or residue of the estate undisposed of by the will, as of any other portion of the estate. He takes the estate under the will for purposes of administration, and of distribution to those entitled; and while a court of equity has a long established jurisdiction in all matters of trust, of account, of administration, and of construction, in the settlement of estates, yet such jurisdiction is not exclusive of the very ample jurisdiction conferred on the orphans' courts of Maryland, and the special term of the Supreme Court of the District for orphans' court business, by the testamentary act of 1798, ch. 101. That act embodies in its various provisions a testamentary and administrative system, intended to be complete in itself." The Chief Justice then gave a *resumé* of the act, and quoted the sections to which we have already referred.

There being a controversy over the distribution between the next of kin and the executrix, we are entirely satisfied that the powers vested in the orphans' court gave it jurisdiction to dispose thereof, and that appellees were not compelled to go into the equity court.

Appellees also moved to dismiss both the writ of error and the appeal, on the ground that the judgment of the Court of Appeals on the first appeal was a complete and final decree, settling and fixing the rights of the parties, and that appellant, because she did not appeal therefrom, was concluded from any review by this court of the matters then considered.

We do not think so. On the appeal of the next of kin, the Court of Appeals reversed and remanded the cause "that the account be restated in accordance with the principles of the opinion of this court."

The account was to be entirely recast under the mandate, and the determination of who were the next of kin, the proportions they should take, the effect of the death of one or more of them, and any other questions that might arise, were remitted to the court below. The settlement was to be a final settlement, and the decree reversing and remanding that such a settlement might be had on the principles indicated was not final so as to justify an appeal by the executrix therefrom, although, had it been a decree of affirmance, the present appellees might have appealed.

We come then to the case upon the merits, and it must be determined on the correct construction of the will, arrived at in accordance with well settled applicable rules.

The cardinal rule is that the intention of the testator expressed in his will, or clearly deducible therefrom, must prevail, if consistent with the

rules of law. And another familiar rule is that the law prefers a construction which will prevent a partial intestacy to one that will permit it, if such a construction may be reasonably given. And in principle this must be so when it is contended that the executor takes merely for next of kin claiming as distributees of an alleged undisposed of residue.

The general intention of the testator in this instance is perfectly clear. The will was inartificially drawn, but its various provisions taken together put it beyond doubt that he intended to dispose of all of his property, and we think that he accomplished that purpose. In doing so all property not expressly given another destination was, in substance, devised and bequeathed to his wife, including some $10,000 on deposit. His intention that she should thus take is evident. And if by the will he disposed of all the property he had, there appeared no necessity for a technical residuary clause.

The property enumerated in the will was the property he owned at the time of his death, except that there was but $810.60 on deposit in bank, and he had $9,000 in United States bonds more than when the will was executed. These bonds were of a subsequent date to that of the execution of the will, and were necessarily, therefore, purchased afterwards.

The will, executed April 3, 1894, referred to $15,500 of bonds, and, at his death, he had bonds for $24,500, $15,500 dated April 23, 1889, and $9,000 dated April 1, 1895.

The question then really comes to this, whether an irrebuttable presumption arises that the testator, by reducing the amount of money on hand at the date of his will, intended that the amount of such reduction though remaining in his assets in another form should be distributed to his next of kin rather than that his wife should receive it.

And it is to be observed at the outset that to each of the next of kin he made a bequest. To his sister, Mrs. Sinnott, a specific legacy of $12,000 of the $15,500 of bonds, and to the children of a deceased sister legacies aggregating $3,000 out of the $3,500 of bonds remaining after the delivery of the $12,000 to Mrs. Sinnott. Certain enumerated promissory notes were otherwise disposed of, and all the rest of his property, real estate, household furniture, Richmond city bond, money, &c., was devised and bequeathed to his beloved wife. There was indeed an apparent surplus of $500 of the $3,500 of bonds, but the allowance to Mrs. Hemenway of $500 immediately followed the bequests to the next of kin.

At his death there were on hand $9,000 more in bonds, and $9,000 less in money. Do the rules of law require it to be held that by this change he intended to withdraw so much from what he had designed his wife to have, and to bestow it on the next of kin in addition to what he had originally expressly given them?

The question involved is one of ademption and not of satisfaction. Without going into refinements in respect of the definition of the word ademption, it may be said to be the extinction or withdrawal of a legacy in consequence of some act of the testator equivalent to its revocation or clearly indicative of an intention to revoke. The satisfaction of a general legacy depends on the intention of the testator as inferred from his acts, but the ademption of a specific legacy is effected by the extinction of the thing or fund bequeathed, and the intention that the legacy should fail is presumed. At least a different intention in that regard which is not expressed will not be implied, although the intention which is expressed relates to something which has ceased to exist.

Williams says in reference to the different kinds of legacies that: "A legacy is general when it is so given as not to amount to a bequest of a particular thing or money of the testator, distinguished from all others of the same kind. A legacy is specific when it is a bequest of a specified part of the testator's personal estate, which is so distinguished. . . . A legacy of quantity is ordinarily a general legacy; but there are legacies of quantity *in the nature* of specific legacies, as of so much money, with reference to a particular fund for payment. This kind of legacy is called by the civilians *a demonstrative* legacy; and it is so far general, and differs so much in effect from one properly specific, that if the fund be called in or fail, the legatee will not be deprived of his legacy, but be permitted to receive it out of the general assets; yet the legacy is so far specific, that it will not be liable to abate with *general* legacies upon a deficiency of assets." Vol. 2, p. 1158. And he adds: "The courts in general are averse from construing legacies to be specific; and the intention of the testator, with reference to the thing bequeathed, must be clear."

These rules are considered and applied in well nigh innumerable cases. Many of them will be found cited in the notes to *Ashburner* v. *Macguire*, 2 White and Tudor's Leading Cases in Equity, Part II, Fourth American Edition from Fourth London Edition, p. 600.

In *Walton* v. *Walton*, 7 Johns. Ch. 258, Chancellor Kent reviews the subject at large with his usual ability, and criticises the observation of Lord Thurlow in *Stanley* v. *Potter*, 2 Cox, 180, that the question in these cases does not turn upon the intention of the testator, saying: "But I apprehend the words of Lord Thurlow are to be taken with considerable qualification; and that it is essentially a question of intention, when we are inquiring into the character of the legacy, upon the distinction taken in the civil law, between a demonstrative legacy, where the testator gives a general legacy, but points out the fund to satisfy it, and where he bequeaths a specific debt."

In *Wilcox* v. *Wilcox*, 13 Allen, 256, Wells, J., said: "Courts do not incline to construe legacies to be specific, and will not do so unless such be

the clear intention of the testator. *Kirby* v. *Potter*, 4 Ves. 748; *Attorney General* v. *Parkin*, Ambl. 566; *Briggs* v. *Hosford*, 22 Pick. 288; *Boardman* v. *Boardman*, 4 Allen, 179. If a legacy be given, with reference to a particular fund only, as pointing out a convenient mode of payment, it is to be construed as demonstrative and the legatee will not be disappointed though the fund wholly fail."

In *Tifft* v. *Porter*, 8 N. Y. 516, Johnson, J., speaking for the majority of the court, said: "A legacy is general, when it is so given as not to amount to a bequest of a particular thing or money of the testator distinguished from all others of the same kind. It is specific, when it is a bequest of a specified part of the testator's personal estate which is so distinguished. . . . The inclination of the courts to hold legacies to be general, rather than specific, and on which the rule is based that to make a legacy specific, its terms must clearly require such a construction, rests upon solid grounds. The presumption is stronger that a testator intends some benefit to a legatee, than that he intends a benefit only upon the collateral condition that he shall remain till death, owner of the property bequeathed. The motives which ordinarily determine men in selecting legatees, are their feelings of regard, and the presumption of course is that their feelings continue and they are looked upon as likely to continue. An intention of benefit being once expressed, to make its taking effect turn upon the contingency of the condition of the testator's property being unchanged, instead of upon the continuance of the same feelings which in the first instance prompted the selection of the legatee, requires, as it ought, clear language to convey that intention."

And so Alvey, C. J., in *Gelbach* v. *Shively*, 67 Md. 498: "Ordinarily, a legacy of a sum of money is a general legacy; but where a particular sum is given, with reference to a particular fund for payment, such legacy is denominated in the law a *demonstrative* legacy; and such legacy is so far general, and differs so materially in effect from one properly specific, that if the fund be called in or fail, or prove to be insufficient, the legatee will not be deprived of his legacy, but he will be permitted to receive it out of the general assets of the estate. *Dugan* v. *Hollins*, 11 Md. 77. But such legacy is so far specific that it will not be liable to abate with *general* legacies, upon a deficiency of the assets, except to the extent that it is to be treated as a general legacy, after the application of the fund designated for its payment. *Mullins* v. *Smith*, 1 Drew. and Sm. 204; 2 Wm's. Ex'rs 995. The authorities seem to be clear in holding that whether a legacy is to be treated as a demonstrative legacy, or is one dependent *exclusively* upon a particular fund for payment, is a question of construction, to be determined according to what may appear to have been the general intention of the testator. . . . It is certainly true, as a

general proposition, as was said by the Vice Chancellor in *Dicken* v. *Edwards*, 4 Hare, 276, that where a testator bequeaths a sum of money in such a manner as to show a *separate and independent intention* that the money shall be paid to the legatee *at all events*, that intention will not be held to be controlled merely by a direction in the will that the money is to be raised in a particular way, or out of a particular fund."

These references, and rulings of similar import are legion, serve to illustrate the governing principles. The intention of the testator must prevail, and legacies will not be held specific, when the result would be that the mere transmutation of money into securities raised an irrebuttable presumption of ademption inconsistent with the intention of the testator as plainly deducible from all the terms of his will taken together.

As we have already stated, the general intention of the testator in this case was to leave all his property to his wife except what was expressly otherwise disposed of, and among the clauses inserted in effectuation of that result were these: "Also, my business as a claim agent and as publisher of 'The Vedette,' together with all books, papers, files, office furniture, &c., &c. Also 200 shares of Sutro tunnel stock and Comstock bonds; also, notes and evidences of indebtedness to me, of more or less value; also, deposits of currency entered on my bank book of the National Metropolitan Bank amounting to $10,000.00, more or less." If the latter item stood alone and were not read in connection with the will as a whole, it might well be that it should be held to be a specific legacy, adeemed *pro tanto* by the use of the money except $810.60 in the purchase of additional bonds, or otherwise. But taken in connection with all the provisions of the will; with the manifest general intention of the testator; and with the rules against partial intestacy, and against treating legacies as specific, if that construction can be avoided, we think that it should be regarded as in its nature a demonstrative legacy, and not adeemed by the change from money into property.

Assuming that the testator had at the date of the will about $10,000 on deposit in the bank, his intention was clear that his wife should receive the amount, and we are of opinion that we ought not to defeat that intention by holding that the pecuniary legacy was specific, and that the subsequent change was an ademption, and so a rule of law rather than a question of intention.

In *Towle* v. *Swasey*, 106 Mass. 100, a legacy of "whatever sum may be on deposit" in a certain savings bank was held to be specific, but there the provisions of the will evidenced no intention to the contrary, and the language used essentially differed from that in this case.

It results that Mrs. Kenaday was entitled to credit herself with the $9,218.76, and that the original decree of the orphans' court was cor-

rect. But in view of the lapse of time and the course of the litigation, we shall simply reverse the decree of the Court of Appeals and remand the cause to that court with a direction to remand it to the court below for a restatement of the final account in accordance with the views we have expressed.

So ordered.

Mr. Justice BREWER and Mr. Justice PECKHAM dissented.

True copy.

Test:

Clerk Supreme Court, U. S.